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SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

ROBERT J. BURCH, Petitioner

v.

THE TOWNSHIP OF CHATHAM, et. al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE FEDERAL QUESTION

Where a cause of action arises from alleged violations of an individuals rights secured by the Federal Constitution as a consequence of unlawful acts of government (42 USC Sec 1983), is it within the discretionary authority of the State and Federal courts to wholly disregard every and all admissible evidence properly offered in proof of the material facts of the case, whereby the court fails to admit, or exclude, or take notice of, or rule upon, or make finding upon, or otherwise fails to acknowledge the existence of the admissible evidence filed under oath which tends to prove the allegations of the complaint, accordingly, said arbitrary judicial discretion permitting the court to draw unsupported inferences most favorable to the movant opposing party to arrive at a decision to dismiss the civil rights case and otherewise find for the government defendants?

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JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES R.14.1(e)

The jurisdiction of the Supreme Court is invoked pursuant to Title 42 United States Code Section 1983, Title 28 United States Code Section 1291 and Section 1331, and S.Ct.R.10(a)

The judgments sought to be reviewed are:

(a) The Order of the United States District Court for the District of New Jersey (Newark), entered April 24, 1992, dismissing the Federal Complaint on the grounds of issue and claim preclusion (res judicata and collateral estoppel) pursuant to Fed. R. Civ. P. 12(b)(6). A3; A4 to A15.

(b) The Judgment Order of the United States Court of Appeals for the Third Circuit, entered December 31, 1992, affirming the judgment of the District Court, without opinion. A1; A77 to A85.

STATEMENT OF RELATED CASES AND PRIOR OPINIONS. R.14.1(d)

A. Civil Rights and In LIeu of Prerogatiive Suits Filed in the Law Division of the Superior Court of New Jersey.

Amended Complaint (Sec 1983, Fourth Cou.): Docket No. L-9992-87. A48.

Filed: July 23, 1987.

Disposition: Order Dismissing Action, February 26, 1988. A21; A26 to A37.

Complaint: (Sec 1983, Fifth Count): MRS-L-1194-88. A49.

Filed: April 4, 1988.

Disposition: Denied Hearing on Sec 1983 Action, October 31, 1989. Final Judgment on State Writ Issues Only, November 24, 1989.

B. Appeal to the Appellate Division of the Superior Court of New Jersey.

Appeal, of Order Dismissing Action for Law Division Docket No. L-9992-87: Appellate Docket No. A-4122-89T2. A67.

Filed: June 22, 1990.

Disposition: Appeal Denied, March 8, 1991.
A17 to A20.

C. Appeal to the Supreme Court of New Jersey.

Petition for Certification: Docket No. 33,478. A70.

Filed: March 26, 1991.

Disposition: Certification Denied, July 11, 1991. A16.

Certification for Reconsideration; Docket No. 33, 478. A42 to A47.

Filed: July 18, 1991.

Disposition: Reconsideration Denied, October 1, 1991.

D. Complaint (the Federal Complaint) Filed in the United States District Court for the District of New Jersey.

Complaint: Docket No. 91-5446. A38 to A47; A74.

Filed: December 18, 1991.

Disposition: Order, Dismissing Complaint on Preclusion Pursuant to Fed. R. Civ. P. 12(b)(6), April 24, 1992. A3; A4 to A15.

E. Appeal to the United States Court of Appeals for the Third Circuit.

Appeal: Docket No. 92-5290. A77 to A85.

Filed: August 14, 1992.

Disposition: Judgment Order, Affirming Dismissal of Complaint Without Opinion, December 31, 1992. A1.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS.

R.14.1(f)

Constitution of the United States, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 United States Code Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Fed. R. Evidence:

> Rule 102. Purpose and Construc..on.
> "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the laws of evidence to the end that the truth may be ascertained and proceedings justly determined."

New Jersey R. Evidence:

> Rule 2. Scope of the Rules.
> "(2) All other rules contained in this act, or adopted pursuant thereto, shall apply in <u>every proceeding</u> (emphasis added), criminal or civil, conducted by or under the supervision of a court, in which evidence is produced."

ORDER, Supreme Court of the United States, November 20, 1972.

> "--that the rules hereinafter set forth, to be known as the Federal Rules of Evidence, be, and hereby are, prescribed-- to govern <u>procedure</u> (emphasis added), in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts--."

STATEMENT OF THE CASE

I express a belief, based upon a reasoned and studied judgment, that the decision of the U.S. District Court and the panel decision of the U.S. Court of Appeals for the Third Circuit is contrary to and in conflict with prior decisions of the Supreme Court of the United States, and that this appeal involving the arbitrary departure of the courts from accepted due process within judicial proceedings as required by the Supreme Court poses a question of exceptional public importance, to wit, the Federal Question herein.

The civil rights action set forth in the instant Federal complaint and underlying this appeal by petition for a writ of centiorari was originally brought in the Law Division of the New Jersey Superior Court within two in lieu of prerogative writ suits instituted in 1987

and 1988, in compliance with the mandate of the entire controversy doctrine and pursuant to the authority of Title 41 USC Sec 1983.* Law Division Docket No. L-9992-87 and Docket No. MRS-L-1194-88. A48; A49.

The Federal Question giving rise to this appeal emerged from the legally improper dismissal of the aforesaid original

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*The two federal questions raised in the State suits dealt with an individual landowner's right to procedural and substantive due process before the local governing body and planning board, and the right of a landowner to the equal protection of a municipality's existing uniform (district-wide) zoning regulations, pursuant to State law. Constitu. Amend. XIV; N.J.S.A. 40:55D-1, et. seq.

This appeal does not address the merits of those federal questions unheard in the State courts, or the merits of the consolidated federal complaint. This appeal addresses only the denial of procedural due process within the proceedings of the State and Federal courts as set forth by an affirmative answer to the Federal Question herein, and seeks vacation of the order of the District Court dismissing the federal complaint should the Supreme Court decide that the herein Federal Question is to be answered in the negative.

civil rights case (Docket No. L-9992-87) by the Law Division on February 26, 1988, and the subsequent skewing of that action by the State and Federal courts into a more fundamental matter involving the right of each citizen to the equal protection of the laws through the fair and equitable dispensation of procedural due process within the proceedings of the courts.

After five years of costly and wasted litigation in the State and Federal courts on appeals just to be heard, there has emerged a clear and pervasive pattern of discretionary judicial procedure which has the consequence of precluding all opportunity to litigate the constitutional issues and claims arising out of the unlawful conduct of government. This discretionary procedure of the courts not to admit, or exclude, or rule upon, or make finding upon, or otherwise consider

or even acknowledge the existence of the evidences and proofs properly offered has the consequence of suppression of the truth and of precluding a fair and just determination of the issues of the case. Fed. R. Evid. 102.* A81 to A85.

Moreover, this discretionary procedure of preclusion which denies procedural due process permits the courts to draw inferences exclusively most favorable to the movant defendants, with reliance by the courts upon the bare assertions of the defense lawyers for the government unsupported by any admissible evidence. By such improper legal procedure, the courts were enabled to give the illusion of a hearing on the merits in arriving at each

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*"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

decision within the State and Federal courts, specifically, to sustain the dismissal of the Sec 1983 action without consideration of the evidences of the improper dismissal of the State complaint in February 1988, or of the evidences of the factual proceedings in the Law Division which bar the dismissal of the Federal complaint on the grounds of preclusion.

Such arbitrary judicial proceedings which preclude consideration of all admissible evidence offered by a party in a cause of action which clearly is not frivolous, and here is not claimed by any court to be frivolous, conflicts with the procedural due process standards of the Supreme Court, gives rise to judicial inefficiency, and spurs continuing and wasteful litigation, as the long history of this case aptly confirms. Constitu. Amend. XIV; Peduto v. City of North Wildwood, 696 F. Supp. 1004 (D.N.J. 1988);

Doerinkel v. Hillsborough Twp., 835 F. 2d 1052 (3rd Cir. 1987); Martucci v. Mayer, 210 F. 2d 259, 260 (3rd Cir. 1954); Washington Twp. v. Gould, 39 N.J. 527, 533 (1973).

Part A

Statement of the Case and Proceedings in the Law Division of the New Jersey Superior Court Relevant to the Federal Question.

The matter of the arbitrary procedure of the courts to wholly disregard any and all admissible evidence properly offered in proof of the material facts of the case first emerged from the summary dismissal of the constitutional and prerogative writ suit in February 1988, and subsequently evolved as a prevasive judiciary procedure during the appeals to the State Law Division from 1988 to 1990 for reconsideration of that dismissal. A21; A24; A26; A50; A55; A59; A61; A63; A64.

The initial civil rights action (Docket No. L-9992-87) was summarily dismissed on a (reversible) technicality by the State Law Division on February 26, 1988, without hearing on the merits in a premature and

legally improper "summary judgment" disposition. A21; A26.

At that critical hearing,* the Court was offered a technical reason by the government's defense counsel to dispose of the case without a hearing on the merits: the false assertion by counsel that the record of the hearings before the local planning board was "irredeemably deficient". A27.

Then, with no discovery material on file and plaintiff's motion to permit

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*Each and every appeals court (State Appellate Division, New Jersey Supreme Court, United States District Court, United States Court of Appeals) ultimately rely upon the "summary judgment" dismissal of February 26, 1988, per se, without review of the factual record in the Law Division, to make the finding in one form or another that "the judgments entered in the New Jersey State courts were valid, final and on the merits", accordingly, to sustain that legally improper dismissal of February 26, 1988, and to grant the government's motion to dismiss the Federal complaint on the grounds of preclusion pursuant to Fed. R. Civ. P. 12(b)(6).

discovery denied, the Court sought to further justify the dismissal of the Sec 1983 action by making declarations of fact on the constitutional issues in controversy, drawing all inferences most favorable to the movant defendants, and by granting blanket absolute immunity from Sec 1983 liability to the private and municipal defendants (including two private attorneys). The Court then forthwith entered the Order Dismissing Action of February 26, 1988. A28 to A31; A21.

The fact of the matter is that the State complaint was summarily disposed of by a premature and legally improper dismissal based upon an unsustainable technical error and upon incorrect, unsupported and legally inappropriate findings by the Court under the illusion of a purported "summary judgment" disposition. Accordingly, there could not have been, and there never was, an

"adjudication on the merits" of any civil rights issue of the State complaint, as has been incorrectly asserted in the several opinions of the State and Federal appeals courts and in the Federal District Court. A10; A14; A18.

The purported "summary judgment" dismissal of the State complaint under the factual circumstances of the proceedings in the Law Division is in conflict with the rules governing the courts, is contrary to decisional case law, disregards the legal foundation of a summary judgment disposition, and is in opposite to the purpose and proper conduct of summary judgment proceedings. Fed. R. Civ. P. 56; R. Ct. State J. 4:46; N.J. 47:1A-1, et. seq.; Solomon v. Eli Lilly & Co., 95 N.J. 58 (1984); Carey v. Pipus, 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042 (1978); T. & M. Homes Inc. v. Twp of Mansfield, 162 N.J. Super 497 (1978); Schuer v. Rhodes,

416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 (1974); E. Rutherford Ind. Park v. State, 119 N.J. Super 352 (Law Div. 1972); Gureghian, et. al. v. Hackensack Hosp., et. al., 109 N.J. Super 143 (Law Div. 1970); O'Neil v. State H'Way Dept., 40 N.J. 115 (1974).

Notwithstanding the legal impropriety of the dismissal, this first decision by the senior judge of the Law Division set the precedent for denial of all subsequent appeals to the Law Division for reinstatement, for denial of remand by the State Appellate Division and the State Supreme Court, and for denial of hearing on the merits and appeal for remand by the Federal courts, with reliance by each court upon the discretionary procedure of omission of any consideration of admissible evidences in order to avoid dealing with the factual merits of the case. A1 to A24.

While in the Law Division the arbitrary procedure of the Court not to acknowledge the evidences was applied to avoid hearing on the merits of the original civil rights action (Docket No. L-9992-87), in the State and Federal appeals courts and in the District Court the arbitrary procedure denying due process took the form of omission of any consideration of the factual record of the proceedings in the Law Division, evidence which clearly should invalidate the judgment of preclusion entered by the District Court April 1992, affirmed by the U.S. Court of Appeals, as set forth below in Part B to Part D.

Subsequent to dismissal of the case on February 26, 1988, the Federal Question was first raised in the Law Division in the form of assertions contained within documents and oral arguments filed from May 1988 to February 1990, in support of

motions for reinstatement and of motions to dismiss the frivolous counterclaims of defendants. A50 to A64.

The essence of the contents of the documents relevant to the herein Federal Question is summarized in the following excerpts selected from two of the numerous documents of evidence filed in the Law Division:

> "The evidences and proofs (emphasis in the original) acquired under oath or certification and filed within the documents submitted to the Court-- received no reference by or opinion from the Court, and were not reviewed or ruled upon by the Court at hearing on July 27, 1988, as to the effects of such evidence and proofs upon the ruling of the Court to deny plaintiff's motion to Reinstate the Amended Complaint (Docket No. L-9992-87)."
> Post-Order Certification, August 31, 1989. A63.

> "As you (The Court) may be aware, I am extremely frustrated and upset by the judiciary process as a consequence of the Court three (3) times summarily disposing of the Fourth Count of the underlying complaint for which substantial showings have

> been made, and two (2) times reversing the orders of the Court by reinstating patently frivolous counterclaims following plaintiff's filing appeals as of right (Appellate Division). As a consequence, what appears to be required is new legislation and/or changes in the rules governing the courts. My intention is to proceed accordingly."
> Letter to Hon. Reginald Stanton, A.J.S.C., August 31, 1989. A61.

The disposition of the three appeals to the Law Division (1988-1989) for reinstatement of the Sec 1983 suit is summarized in the last order of the Law Division, entered August 1989, thus finally denying any and all opportunity for hearing on the evidences in the Law Division of the underlying civil rights action:

> ORDER:
>
> "1. The application of plaintiff for reinstatement of his Amended Complaint is hereby denied.
>
> 2. The application of plaintiff for the dismissal of the counterclaims of Socrates Kyritsis and Charles Kurebanas (private defendants) is hereby denied."
>
> Order, August 31, 1989. A24.

Part B

Statement of the Case and Proceedings in the Appellate Division of the Superior Court of New Jersey Relevant to the Federal Question.

The herein Federal Question was raised in the State Appellate Division in the form of assertions of denial to plaintiff of "a proper hearing of the evidences and proofs of wrongful and unlawful conduct of" the municipal and private defendants in a conspiracy to willfully violate the protected rights of plaintiff in return for an illegal cash payment to the municipality ($125,000.00). The appeal to the Appellate Division for remand for hearing on the merits was supported by the aforesaid substantial evidences of record filed in the Superior Court (interrogatories, admissions, depositions, documents). A68.

However, the Appellate Division made the determination to disregard the factual

record of the proceedings in the Law Division which confirms the legal impropriety of the "summary judgment" dismissal of February 26, 1988; and to disregard the evidences properly filed in the Superior Court which meet in full all criteria required to sustain a Sec 1983 action. Instead, with reliance solely upon a presumption of validity of the summary judgment dismissal of February 26, 1988, per se, and drawing its opinion from the bare assertions in the briefs of the defense counsel for government as to the merits of the case, unsupported by any evidence ("trial-by-brief"), the Appellate Court concluded:

> "We discern no infringement of plaintiff's civil rights or any damage to plaintiff resulting from defendants' conduct."
> A18.

> "The summary judgment dated February 26, 1988, is affirmed substantially for the reasons stated by Judge Stanton for the Law Division."
> A19.

Part C

Statement of the Case and Proceedings in the Supreme Court of New Jersey Relevant to the Federal Question.

The herein Federal Question was raised in the State Supreme Court in the form of assertions within briefs filed in support of Petition(s) for Certification and within Certification(s) for Reconsideration. Selected excerpts from the briefs and the certifications relevant to the raising of the Federal Question in the State Supreme Court follow:

> "The Superior Court rendered opinion (to deny hearing and remand) based upon inferences most favorable to the municipal and private defendants-respondents drawn from the unsupported assertions of denial of wrongdoing in the pleadings of defendants-respondents, while at the same time the Court disregarded the evidences and proofs submitted by the plaintiff-appellant under certification to the Court, failed to review, make finding on or otherwise act upon the evidences, and failed to make a ruling on, or even acknowledge the existence

> of the complete record below which supports the civil rights and in lieu of prerogative writ action."
> A71 to A72.
>
> "---the civil action may be summarily dismissed-- based upon the determination of the State Court not to review or make findings on the evidences and proofs filed under certification with the Court which meet in full all criteria for the required substantial showing to sustain a Sec 1983 cause of action."
> A42, Exhibit "A" to the instant Federal Complaint.
>
> "The rulings and determinations of the State Court appear to be contrary to the dictates of the due process and equal protection provisions of the Constitution of the United States and the Constitution of the State of New Jersey."
> A45, Exhibit "A" to the Federal complaint.

Petition(s) for Certification and Certification(s) for Reconsideration were denied by the State Supreme Court, July 11, 1991. A16.

Part D

Statement of the Case and Proceedings in the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit Relevant to the Federal Question.

The Federal Question was raised in the District Court in the form of statements of denial of procedural due process, as set forth in the instant Federal complaint filed December 18, 1991, and in brief and supporting documents filed with the District Court seeking a summary judgment on Count I of the said complaint to invoke the jurisdiction of the Federal District Court. A39 to A41; A75.

The Federal Question was raised in the U.S. Court of Appeals in two briefs containing assertions of abuse of discretion by the District Court. Specifically, the District Court relied upon the inadmissible hearsay of the government's defense to justify dismissal of the Federal complaint

on preclusion effect pursuant to Fed. R. Civ. P. 12(b)(6), all the while failing to acknowledge or in any way consider the admissible evidence filed by petitioner under affidavit, to wit, the factual record of the proceedings in the Law Division which clearly bars preclusion as grounds for dismissal of the Federal complaint. See, for example, the statements of the Assignment Judge of the Law Division, A33, A34 and A37.

In rendering decision on the government's motion to dismiss the Federal complaint on preclusion, the District Court in its opinion cast about, and finding no factual basis in the pleadings for dismissing the complaint on preclusion, ultimately was compelled (as in the State appeals courts) to rely upon the mere presumption of validity, per se, of the "summary judgment" dismissal of February 26, 1988, as an "adjudication on the merits" of the civil rights action.

At A10:

> "Applying the first prong of the Watkins multi-factored test to the case at bar, it is clear that the judgments entered in the New Jersey State courts were valid, final and on the merits."

And at A14:

> "Rather, the court (Law Division) granted summary judgment and declared that plaintiff failed to present evidence sufficient to support a finding that the alleged civil rights violations actually occurred."

In the first place, the assertions in the opinion of the District Court upon which the Court relied to dismiss the complaint are untrue. Neither the Law Division during the so-called summary judgment proceedings in February 1988 or at anytime thereafter from 1988 to 1990, by any written or oral communication, nor the State Appellate Division or State Supreme Court during any proceedings on the appeals for remand for hearing on the merits, made any declaration as claimed

by the District Court as to the existence or absence of evidences filed by the petitioner. On the contrary, it is this simple fact--the failure of the State courts to even acknowledge the existence of the evidences properly offered in proof of the willful denial of protected rights by unlawful acts of government--that is at the heart of all appeals to the State and Federal courts, and of this appeal to the Supreme Court of the United States as embodied in the herein Federal Question, and now spanning more than five years of entirely wasted litigation just for an opportunity to be heard on the evidences.*

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*It is noted that no State or Federal court, or the defendants, have ever charged that petitioner's allegation of civil rights violations by local government were frivolous. The dispute here is only to whether the original civil rights case was heard on the merits in the State courts or was denied hearing by a judicial procedure which denies actual procedural due process within the proceedings of the courts.

In the second place, the decision of the District Court to dismiss the Federal complaint on preclusion pursuant to Fed. R. Civ. P. 12(b)(6), and the U.S. Court of Appeals summary Judgment Order sustaining that dismissal, cannot be justified as a matter of fact and of law. Fed. R. Civ. P. 56; Fed. R. Evid. 803(24); R. Ct. N.J. 1:6-6; R. Ct. N.J. 4:46-1; Barthelemy v. Air Line Pilots Ass'n, 897 F. 2d 999 (9th Cir. 1990); Boston Athletic Ass'n v. Sullivan, 867 F. 2d 22 (1st Cir. 1989); Katsouffris v. Adamo, 216 N.J. Super 84 (App. Div. 1987).

The U.S. District Court and the U.S. Court of Appeals have relied entirely upon the pervasive arbitrary judicial procedure which underlies this appeal for their decision to dismiss, specifically, the total disregard of the evidence filed by petitioner in proof of the plain fact of the matter that the Sec 1983 action was

never heard on the merits in the State courts. Here, the Federal courts have decided to ignore the factual record of the proceedings in the Law Division which legally bars the dismissal of the Federal complaint on grounds of preclusion, and instead and once again, the courts have made the determination to rely only upon the unsupported, and patently false, assertions of the government's counsel that all issues and claims "were adversely adjudicated against Plaintiff in the State Court".

To this assertion, the facts prove otherwise.

The Assignment Judge of the State Law Division repeatedly declared over the three years from 1988 to 1990 during the intense appeals to that Court for reinstatement, the forum where the purported "adjudication on the merits" took place, that the issues and claims of the original civil rights action were <u>never</u> heard on

the merits.

> THE COURT: "I really at this stage can't get to the merits of that. See, the most I can do at this point, Dr. Burch, is decide---the most I could do would be to decide that (I) prematurely dismissed the action, reinstate it, get you to flesh out the record, you know, and then I could, maybe then sometime get to the merits of the case. But there really is no-- I just can't deal with it."

> THE COURT: "Mr. Bernstein (defense counsel for the government), the real question is whether-- the only question that I can address is whether I set aside the judgment (of Febraury 26, 1988) because we can now produce the record."

First Appeal to the Assignment Judge of the Law Division for Reinstatement, May 12, 1988. A33, A34, A35.

> THE COURT: "It's conceivable to me that this may be bad planning. I never got to the merits of the case. And actually, until I actually get to the merits of a full record, I don't decide the merits."

Judge Stanton, A.J.S.C., Last Day of Appearance, February 1, 1990. A37.

The statements above are among the many evidences contained in the factual record of the proceedings in the Law Divison from 1988 to 1990 which provide the proofs that the petitioner was denied any and all opportunity to litigate the constitutional issues and claims on the evidences arising out of the unlawful conduct of local government.

In the face of the indisputable factual evidence that the civil rights actions brought in the State courts in 1987 and 1988, consolidated in the Federal complaint, were never adjudicated on the merits, what possible justification was there for the Federal courts to dismiss the complaint on purported preclusion grounds?

Inasmuch as the factual record of the proceedings in the Law Division belie the conclusionary statements contained in the opinion of the U.S. District Court, and upon which that Court relied to enter

the Order of April 23, 1992, to dismiss the Federal complaint (preclusion pursuant to Fed. R. Civ. P. 12(b)(6)), it is crystal clear that the District Court was enabled to avoid hearing the case on the merits simply by proceeding along that arbitrary judicial procedure of omission of any consideration of the indisputable evidence of the the factual record below, and instead, as in the State courts, the District Court based its findings solely upon the unsupported assertions of the government contained in defense counsel's briefs, and thus ultimately was compelled to rely upon the improper "summary judgment" of February 26, 1988, to justify dismissal of the Federal complaint in April 1992.

ARGUMENT

The discretionary procedure set forth in an affirmative answer to the herein Federal Question, as exercised by the State and Federal courts in this case, departs so far from the accepted and usual practice of judicial proceedings and from prior decisions of the Supreme Court of the United States so as to constitute a manifest injustice within the proceedings of the courts.* S. Ct. R. 10(a).

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*For the civil rights action set forth in the Federal complaint, dismissed by the District Court on the grounds of preclusion and on appeal here for remand, the arbitrary procedure which denies actual procedural due process within the proceedings of the courts does not even permit a determination as t whether a cause of action is meritorious, as demonstrated by the premature and legally improper summary dismissal of the suit by the Law Division in February 1988, and the subsequent reliance upon that dismissal, per se, by all State and Federal appeals courts from 1988 to 1992 as a valid "adjudication on the merits."

I believe this matter to be of grave public importance, for it bears upon the reality and the perception of the courts as the trustees of the right of each citizen to the equal protection of the laws through the fair and just hearing of grievances arising out of wrongful acts of government, and upon the public's confidence in the proper operations of their government. Constitu. Amend. XIV.

There is no provision within the rules of evidence of the New Jersey State courts or of the Federal courts which confers a discretionary authority upon a court to wholly disregard any and all admissible evidence offered as essential proof of the material facts of a case which clearly has been demonstrated to be meritorious and involving infringement of protected rights pursuant to Federal statute 42 USC Sec 1983. N.J. R. Evid. 1, et. seq.; Fed R. Evid. 101, et. seq.; Owen v. City of Independence, 63 L. Ed. 2d 673, 692 (1980).

Notwithstanding the apparent need for relaxation of the rules in the interests of justice and fairness at the discretion of the courts within the standards generally set by the rules of evidence (N.J.R. Evid. 4; Fed. R. Evid. 803), it remains the rule of law evolved from case decisions that substantive findings of the courts shall be derived from a consideration of the admissible evidences properly offered in proof of the material facts, whether that ruling within the court's discretion be admission or exclusion. But the total disregard of all admissible evidence in a wholesale departure from the rules of evidence constitutes an abuse of that discretion, by any reasonable standard. State v. Koedatich, 112 N.J. 225, 313 (1988); State v. Bass, 221 N.J. Super 466, 484 (App. Div. 1987); State v. Catlow, 206 N.J. Super 186 (App. Div. 1985); State v. Engel, 99 N.J. 453, 462 (1985); State

v. Balthrop, 92 N.J. 542, 548 (1983); State v. Carter, 91 N.J. 86, 106 (1982); State v. Jackson, 182 N.J. Super 98, 101 (App. Div. 1981).

Moreover, while this case is specific to a Sec 1983 action, the arbitrary procedure of the courts denying due process which has emerged from almost six years of intense and costly appeals to be heard appears to be pervasive throughout the State and Federal court systems.*

It is clear from the long history of this case that in balancing a citizen's claim to the protections guaranteed by the Bill of Rights against the competing

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*A survey of more than eighty professionals (legal scholars, practicing lawyers, legislators, judges, public interest groups) requesting information as to the prevalence of the discretionary procedure set forth by an affirmative answer to the herein Federal Question, while not conclusive, tends to show that it is the pro se litigant who is most likely to be denied actual procedural due process within the proceedings of the courts.

considerations of government operations, the courts have followed a policy of non-intervention where the unlawful intrusion of government falls just short of an actual "taking" of property or liberty, and this is so even where no public interest is claimed by government in defense of its unlawful conduct. Accordingly, the asserted constitutional right of each citizen to the peaceful use of their property without interference from those who would wield State power in the service of only private interests may be infringed under the broad authority of government exercised within the covers of the home rule doctrine.

It is through that judicial procedure within the Federal Question, which in fact circumvents procedural due process while giving the illusion of a hearing on the merits, that the courts find the means and justification for implementation of their policy of non-intervention.

But if infringement of protected rights by government be condoned by the courts, how can a society expect obedience to the laws and civil and individual responsibility, and in a larger sense, respect for the institutions we are asked to yield our natural rights to in the name of effective representative government, if the courts fail in their primary duty to protect the basic guarantees of each individual citizen, without exception, without compromise to the capriciousness of those who have assumed the mantle of the sovereign power? While there may be some governmental conduct which steps within the constitutional space of an individual in the service of private enrichment yet which is not actionable, we have not been informed where that thin line has been drawn by those who decide the laws.

Moreover, I believe that the prior decisions of the Supreme Court suggest

otherwise, for against the unlawful intrusion of government into our homes, where may we as individual citizens turn for protection if not to the courts? What kind of law is it that permits those in government, who are entrusted with the plain duty to see to the faithful execution of the laws, to engage in deceit and chicanery to subvert the laws with reckless disregard for the protected rights of others or for the welfare of the community? Under such rule of law, individuals who are subjected to the threat of actual injury by the willful misconduct of government are forced to spend large sums of money and productive time in attempt to remove the threat and thereby protect their property and personal safety against illegal invasion under color of law, then are rendered helpless to countervail or recover costs, or even to deter repeated acts of government which violate the dictates of

the Federal constitution, by the determination of the courts not to intervene in such government affairs.

But something is very wrong here. When the legal safeguards intended to ensure that the conduct of government shall be guided by the rules of just laws and reason fail, and the line between proper discretionary acts and the violations of the public trust and the Federal Constitution is clearly demonstrated to have been crossed, then no balancing of government policy, no matter how well cloaked in the common good, can justify the infringement of those rights which we have been led to believe are inalienable and entitled to protection against government transgressions through the fair and equitable dispensation of procedural due process within the proceedings of the courts.

If this not be true, then our belief

in the absolute protection of the Bill of Rights for each individual against government abuse of the sovereign power is a mere delusion, and no person is secure in their property and liberty whenever those rights are weighed by the courts against the conduct of those who have acquired the authority to subject a citizen to the awesome threat of misused government power.

When the courts, to whom we have looked as the final keepers of the laws, choose in their discretion to steer a course which deviates from the impartiality and fairness which underlies that proper judicial procedure which is so essential to the quest for truth, here by shrouding the truth in an illusion of a hearing on the merits by a discretionary procedure which denies actual due process, we are, in fact, denied the protection of the laws.

CONCLUSION

The petitioner respectfully requests that the Supreme Court of the United States take under review the herein Federal Question, and upon a finding, derived from the due process clause of the Constitution and pursuant to the prior rulings of the Supreme Court, that the discretionary authority of the courts under the State and Federal rules of evidence does not extend to the total disregard of all admissible evidence properly offered in proof of the material facts of a meritorious cause of action brought pursuant to 42 USC Sec 1983, the Supreme Court vacate the order of the District Court entered April 24, 1992 (A3), which dismissed the Federal complaint on the grounds of preclusion pursuant to Fed. R. Civ. P.

12(b)(6), and remand the civil rights case for proper hearing on the merits by trial by jury.

Respectfully submitted,

ROBERT J. BURCH
Plaintiff-Petitioner

DATE: MARCH 25, 1993

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5290

ROBERT J. BURCH,

Appellant

v.

THE TOWNSHIP OF CHATHAM; PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; PRISCELLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS; RICHARD BRADLEY

Appellees

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 91-05446
(District Judge: Honorable John W. Bissell)

SUbmitted Under Third Circuit Rule 12(6)
November 16, 1992

Before: BECKER, GREENBERG and NYGAARD
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

(BECKER)

Attest:

Sally Mrvos, Clerk

DEC 31, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT J. BURCH :

Plaintiff :

v. : Civil Action

No. 91-5446

THE TOWNSHIP OF CHATHAM: THE PLANNING BOARD OF CHATHAM TOWNSHIP; : JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL : BISSELL; PRISCILLA BECK OTTO VOPELIUS; RICHARD: BRADLEY; GAYLE WILLIAMS DONALD MALEHORN;CHARLES: KUREBANAS; and SOCRATES KYRITSIS :

ORDER

FILED
Apr 24 1992

Defendants

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 23rd day of April, 1992,

ORDERED that defendants' motion to dismiss plaintiff's complaint be and it hereby is granted pursuant to Fed. R. Civ. P. 12(b)(6); and it is further

ORDERED that defendants' motion for the imposition of sanctions be and it hereby is denied.

JOHN W. BISSELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT J. BURCH :

Plaintiff

v. : Civil Action No. 91-5446

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; PRISCILLA BECK; OTTO VOPELIUS; RICHARD BRADLEY; GAYLE WILLIAMS: DOANLD MALEHORN; CHARLES KUREBANAS; and SOCRATES KYRITSIS :

OPINION
(Abbreviated)

Defendants

APPEARANCES:

ROBERT J. BURCH, pro se
17 Meyersville Road
Chatham, New Jersey 07928

CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI & STEWART
By: Carl R. Woodward, III, Esquire
6 Becker Farm Road
Roseland, New Jersey 07068
(Attorneys for all Defendants except Charles Kurebanas and Socrates Kyritsis)

O'DONNELL, KENNEDY, VESPOLE, PIECHTA, & TRIFIOLIS
By: John C Kennedy, Esquire
414 Eagle Rock Avenue
West Orange, New Jersey 07052-42[illegible]
(Attorney for Defendant Charles Kurebanas)

DISCUSSION

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." District of Columbia v. Air Florida, 750 F. 2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." Quiones v. Szorc, 771 F. 2d 289, 291 n.3 (7th Cir. 1985).

A complaint drafted by a pro se litigant must be liberally construed, Haines v. Kerner, 404 U.S. 519, 520 (1971), and

pro se submissions "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976), reh'g denied, 429 U.S. 1066 (1977) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1971), reh'g denied, 405 U.S. 948 (1972); see Conley v. Gibson, 355 U.S. 41, 45-46 (1957), on reh'g, Gillespie v. Crawford, 833 F. 2d 47, 49 (5th Cir. 1987), on reh'g, 853 F. 2d 1101 (5th Cir. 1988) (en banc). When reviewing a pro se complaint, a court must assume plaintiff's factual allegations to be true and construe his claim liberally. Nietzke v. Williams, 490 U.S. 319, 330 n.9 (1989); Roman v. Jeffes, 904 F. 2d 192, 197 (3rd Cir. 1990). In deciding whether to dismiss a pro se complaintit must "appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

Therefore, on a motion to dismiss a complaint drafted by a pro se litigant, the complaint must be given even more leeway than the very liberal standards for withstanding a motion to dismiss a complaint drafted /by an attorney.

While thus obliged to construe a litigant's pro se complaint liberally, a court may not bend the law in his favor. The Full Faith and Credit Act, 28 U.S.C. Sec 1738, mandates that state court proceedings "'shall have the same full faith and credit in every court within the United States... as they have by law or usage in the courts of such state... from which they were taken.'" Marrese v. American Acad. Ortho. Surgeons, 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. Sec 1738). This standard has been applied incivil rights actions filed under 42 U.S.C. Sec 1983. Peduto v. City of North Wildwood, 878 F. 2d 725, 728 (3rd. Cir. 1989) (citing

Migra v Warren City School Dist. Bd. of Ed., 465 U.S. 74 (1984); Allen v. McCurry, 449 U.S. 90 (1980).

Additionally, under this statute, federal courts are to "refer to the preclusion law of the state in which judgment was rendered," Marrese, 470 U.S. at 380, and are not to "employ their own rules of res judicata in determining the effect of state judgments." (Id., quoting Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982). Utilizing these principles, New Jersey law must be examined in resolving the preclusionary controversy presented here, that is, whether plaintiff's claims are precluded because of the foregoing judgments in state court.

The New Jersey Supreme Court has often employed the doctrine of res judicata, which generally provides that "[a] cause of action once finally determined between parties on the merits by a tribunal having

jurisdiction cannot be relitigated by those parties... in a new proceeding." Roberts v. Goldner, 79 N.J. 82, 85 (1979) (citations omitted). The Court has refined and elucidated the elements of this doctrine, particulary in the recent decision Watkins v. Resorts Intern. Hotel & Casino, 124 N.J. 398 (1991). In Watkins the Court noted that federal law and New Jersey law both require three basic elements:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the latter action must grow out of the same transaction or occurrence as the claim in the earlier one.

(Id. at 412 (citing Federated Stores v. Moitie, 452 U.S. 394, 398 (1981).

The Watkins Court also explained that res judicata or claim preclusion applies to all relevant matters that could have been determined in a prior action, not

merely those matters actually decided. (Id., citing Arpel v. Bullington, 330 U.S. 183, 192-93 (1947); Culver v. Insurance Co. of North America, 115 N.J. 451 (1989). A litigant seeking redress for a single wrong must present all legal theories in the initial action, or they will be precluded in any subsequent action. (Id. at 413) (citations omitted).

Applying the first prong of the Watkins multi-factored test to the case at bar, it is clear that the judgments entered in the New Jersey state courts were valid, final and on the merits. Plaintiff's civil rights claims were dismissed on summary judgment by the trial court, and this ruling was specifically addressed and affirmed by the Appellate Division. This judgment meets the Watkins test, as "[a] judgment of involuntary dismissl or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely

as if the order had been entered after trial.'" Velasquez v. Franz, 123 N.J. 498, 507 (1991) (citations omitted).

The second prong of this test is also met, as the parties in the instant case are identical to the parties in the antecedent state action.

The final prong under the Watkins claim preclusion analysis concerns whether the claim in the subsequent action emanates from the same incident that prompted the initial claim. Application of this prong is not simple, and requires a four-point analysis in which the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions) Gissen v. Tackman, 401 F. Supp. 310, 312 (D.N.J. 1975); (2) whether the theory of recovery is the same; (3) whether the witnesses and the documents necessary at trial are the same O'shea v. Chrysler Corp., 206 F. Supp. 601, 605 (D.N.J. 1962); and (4) whether the material facts alleged are the same.

United States v. Athlone Industries, Inc, 746 F. Supp. 977, 984 (3rd. Cir. 1984).

Culver v. Insurance Co. of North America, 115 N.J. 451, 461-62 (12989) (emphasis in original).

Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the state action. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in the state court. The relief sought here parallels the relief previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim.

Accordingly, this claim is barred under the doctrine of res juducata.

Plaintiff's claim is also barred under the doctrine of issue preclusion or collateral estoppel. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." Wheeler v. Nieves, 762 F. Supp. 617, 624 (D.N.J. 1991) (citations omitted). A plaintiff will not be permitted to relitigate issues that have been directly addressed in prior proceedings. (id. at 615).

Issue preclusion is warranted if a court concludes that

> (1) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.

2d 725, 727 n.1 (3rd Cir. 1989) (citing City of Plainfield v. Public Service Electric & Gas Co., 82 N.J. 245, 258 (1980); Charlie Brown v. Board of Adjustment, 202 N.J. Super 312 (App. Div. 1985).

These criteria are all satisfied in the case at bar. The state court addressed plaintiff's assertions of civil rights allegations, and found them to be meritless. The court did not, as plaintiff maintains, fail to adjudicate these allegations due to a deficient record before the planning board. Rather, the court granted summary judgment, and declared that plaintiff failed to present evidence sufficient to support a finding that the alleged civil rights violations actually occurred.

Furthermore, it is evident that the state court's judgments were final and valid. The civil rights claims were addressed at both the trial and appellate levels, and found to be meritless. These

claims were essential to the plaintiff's state action, and the parties in this action are the same as those in the state action. Consequently, plaintiff's claim is barred under the doctrine of collateral estoppel.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed.

JOHN W. BISSELL
United States District Judge

DATED: April 23, 1992

SUPREME COURT OF NEW JERSEY
C-1150 September Term 1990
33,478

ROBERT J. BURCH

Plaintiff-Petitioner

v. ON PETITION FOR CERTIFICATION

THE PLANNING BOARD OF CHAHTAM TOWNSHIP, et. al.

Defendants-Respondents

FILED
Jul 11,1991

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-4122-89T2 having been submitted to this Court, and the Court having considered the same,

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant Rule 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of July, 1991.

Stephen W. Townsend
Clerk of the Supreme Court.

A17
NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4122-89T2

Opinion

ORIGINAL FILED
Mar 8 1991
(Abbreviated)

ROBERT J. BURCH

Plaintiff-Appellant

v.

THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS.

Defendants-Respondents

Argued February 20, 1991-Decided Mar 8 1991

Before Judges Antell and Keefe.

On Appeal from Superior Court, Law Division, Morris County.

Robert J. Burch argued pro se.

Daniel S. Bernstein argued the cause for respondents Planning Board of Chatham Township; Township of Chatham; Jeffrey Taylor; Robert Kirkpatrick; Marshall Bissell; Richard Bradley; Priscilla Beck; Otto Vopelius; Gayle Williams; and Donald Malehorn (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

John C Kennedy argued the cause for respondent Kurebanas (O'Donnell, Kennedy, Vespole & Piechta, attorneys; Mr. Kennedy, of counsel and on the brief).

Edward F. Broderick, Jr., argued th ecause for respondent Kyritsis (Broderick, Newmark & Grather, attorneys; Mr. Broderick and Louis Mondello, on the brief).

(beginning on page 4 of the Opinion)

We discern no infringement of plaintiff's civil rights or any damage to plaintiff resulting from defendants' conduct. His property has not been diminished in value and the fact that the changed landscape will be less to his liking is not a redressible injury.

We note in particular that under our decision in Anastasio v. Planning Bd. of Twp. of West Orange, 209 N.J. Super 499 (App. Div.), cerf denied, 107 N.J. 46 (1986), defendants who are being sued in their individual capacities as members of the Planning Board are absolutely immune from liability in actions brought under 42 U.S.C.A. Sec 1983.

It has long been recognized that the summary judgment procedure

> is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits of the pleadings. dispositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). As the Supreme Court noted in Robbins v. Jersey City, 23 N.J. 229, 241 (1957), the summary judgment procedure affords protection "against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention."

The summary judgment dated February 26, 1988, is affirmed substantially for

the reasons stated by Judge Stanton for the Law Division in his oral opinion of the same date.

R.E. Fox
Clerk
(Appellate Division)

THIS PLEADING CLOSES THE CASE

FILED
Feb 26 1988

BERNSTEIN, HOFFMAN & CLARK
A Professional Corporation
336 Park Avenue
Scotch Plains, New Jersey 07076
201/322-2300
Attorneys for All Defendants Except Charles Kurebanas and Socrates Kyritsis

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ROBERT J. BURCH Plaintiff v.	: SUPERIOR COURT OF NEW JERSEY
THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS. Defendants	: Docket L-9992-87 : Civil Action : ORDER DISMISSING ACTION

THIS MATTER being opened to the Court by Bernstein, Hoffman & Clark, F.C., attorneys for all defendants except CHARLES KUREBANAS and SOCRATES KYRITSIS, Daniel

S Bernstein, Esquire appearing, and in the presence of Charles K. Kurebanas, Esquire. John C. Kennedy, Esquire, and Broderick, Newman, Grather & Aspero, Edward F. Broderick, Jr., Esquire appearing, and being opposed by ROBERT J. BURCH, Pro Se, and the Court having read and considered the Notice of Motion for Remand and accompanying Certification of Daniel S. Bernstein, and heard the arguments of counsel, and for good cause shown:

IT IS on this 26 day of February, 1988 ORDERED that the case be remanded to the PLANNING BOARD OF THE TOWNSHIP OF CHATHAM for a de novo hearing without the Court retaining jurisdiction.

IT IS FURTHER ORDERED that the first three counts of the Complaint are dismissed as moot.

IT IS FURTHER ORDERED that the Fourth Count of the Complaint be and is hereby dismissed.

Routine taxed costs are allowed to the plaintiff as against the Planning Board. No costs are awarded against the individual defendants.

REGINALD STANTON
JUDGE OF THE SUPERIOR COURT, ASSIGNMENT JUDGE

FILED
AUG 15 1989
Reginald Stanton,
A.J.S.C.

CHARLES K. KUREBANAS
50 S. Center St., Bldg. #1
Orange, N.J. 07050
(201) 675-2121
Attorney Pro Se

ROBERT J. BURCH Plaintiff v.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS. Defendants	:	Docket L-9992-87 Civil Action ORDER

This matter coming before the Court on the application of plaintiff Robert J. Burch for an order reinstating his Amended Complaint, and for an order dismissing the Counterclaims of

defendant-counterclaimants Socrates Kyritsis and Charles K. Kurebanas; plaintiff appearing pro se, Charles K. Kurebanas appearing pro se, Edward F. Broderick, Esq., appearing on behalf of Socrates Kyritsis, and Daniel S. Bernstein, Esq. appearing on behalf of Municipal Defendants; and this Court having read and considered all papers filed by the parties, and the arguments of the said persons appearing, and good cause appearing:

It is on this 15 day of August, 1989 ORDERED as follows:

1. The application of plaintiff for a reinstatement of his Amended Complaint is hereby denied.

2. The application of plaintiff for the dismissal of the counterclaims of Socrates Kyritsis and Charles K. Kurabanas is hereby denied.

REGINALD STANTON
JUDGE OF THE SUPERIOR COURT. ASSIGNMENT JUDGE.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
Docket No. L-9992-87

ROBERT J. BURCH

Plaintiff

v.

THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS.

Defendants

Motion for Summary Judgment

(Abbreviated Transcript)

Civil Action

Place: Morris County Courthouse
Morristown, New Jersey

Date: February 26, 1988

BEFORE: HONORABLE REGINALD STANTON, A.J.S.C.

APPEARANCES:

ROBERT J. BURCH
Pro Se

MESSRS. BERNSTEIN, HOFFMAN & CLARK
BY: DANIEL S. BERNSTEIN, ESQUIRE
Attorney for Municipal Defendants

TERENCE E. HEADD,
CSR, Morris County

(DR. BURCH)

I would ask in the near future that not only that the count four be reinstated and allow me my rights to show, make a showing, but in addition that it be amended to include the improper conduct as indicated by the request for a de novo hearing.

In count four, I'm simply asking that I be given the right to deal with the merits of the case. And that's really what today is all about. (Emphasis added). Thank you, Your Honor.

THE COURT: Thank you. I'm satisfied that the record created before the Planning Board of the Township of Chatham in connection with granting this subdivision is irredeemably deficient. Tapes are missing for two of the meetings, a number of-- and the only recording of the meetings was by electronic tape. There were not any shorthand reporters, stenographic reporters present. Tapes for two of the

meetings are missing.

The members of the Board who voted in favor of the application were not present at all of the meetings and had not listened to the tapes or read any transcript with respect to one or more of the meetings which they missed.

So it turns out that some of the votes at least were inappropriate and the record cannot be replicated for review before this Court.

It's clear, then. that the decision to grant the subdivision can't stand because it cannot be judicially reviewed.

(THE COURT continues)

The application for damages was made under 42 U.S.C.A. 1983, Civil Rights Act. The plaintiff claims that his Constitutional rights were violated by one or more of the defendants under color of state law, thus entitling him to compensation under the section 1983 of the Civil Rights Act.

With respect to the individual members of the Planning Board it is clear to me that under the case Anastasio versus Planning Board of the Township of West Orange, 209 New Jersey SUperior Court Reports 499, decided by the Appellate Division in 1986, that the individual members of the Planning Board are immune from suits as this with respect to decisions made by them in their quasijudicial capacity as members of the Planning Board reviewing applications for development approvals of one kind or another which are presented to them.

So the Planning Board members are entitled to an immunity with respect to the claim.

The Planning Board itself does not have such immunity. And Mr. Kurebanas, (private attorney for developer-defendant Kyritsis) well, Mr. Kurebanas might in the sense that he was a participant in

a judicial proceeding, in a quasi-judicial proceeding. He would be entitled to immunity, to participate in the immunity of the individual Board members for essentially the same policy reasons which attach to their immunity.

(THE COURT continues)

So, Mr. Kurebanas is entitled to immunity.

But Mr. Kyritsis and the Planning Board itself are not entitled to immunity.

However, I'm satisfied that in this case it is clear beyond any factual dispute that there has not been a violation of the Constitutional rights of Dr. Burch.

MR. BERNSTEIN: I assume that the summary judgment would extend to Donald Malehorn, who is the Board's attorney, and Robert Kirkpatrick, who is the municipal engineer, and that the absence--.

THE COURT: Malehorn isn't--I see

Kirkpatrick is here. I didn't realize he was the engineer. I thought he was a Planning Board member.

The concept is the same. It's not so much--Well, it might be an immunity one for him, but the ultimate reality is even aside from immunities, there simply hasn't been a Constitutional deprivation. So Mr. Kirkpatrick is out.

I do see Mr. Malehorn, the attorney, yes. He would be protected by immunity and substantively there is not deprivation of rights. So there is a judgment in favor of him.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
DOCKET NO. 1-9992-87

DR. ROBERT J. BURCH :
(Abbreviated)
Plaintiff : STENOGRAPHIC
V. TRANSCRIPT OF
: PROCEEDINGS
THE PLANNING BOARD OF
CHATHAM TOWNSHIP, : MAY 12, 1988
(et.al.)
:
Defendants
_____x

Morris County Courthouse
Morristown, N.J 07960

BEFORE:
THE HONORABLE REGINALD STANTON,
A.J.S.C.

TRANSCRIPT ORDERED BY:
DR. ROBERT J. BURCH

APPEARANCES:

DR. ROBERT J. BURCH
Pro Se

MESSRS. BERNSTEIN, HOFFMAN & CLARK
BY: DANIEL S. BERNSTEIN, ESQ.
For All Municipal Defendants

MESSRS BRODERICK, NEWMARK, GRATHER
& ASPERO
BY: KATHIE VELORIC, ESQ.
For Socrates Kyritsis

PATRICIA B. SCHECHTER, CSR
OFFICIAL COURT REPORTER

(DR. BURCH)

Question: Is the approval of a private access street to a development which is in substantial violations with the minimum requirements of zoning laws and regulations, without notice, without public hearings, without variances, a lawful exercise of the zoning powers (?).

Seven: There is no dispute that the intersection of the proposed development street, Sycamore Drive, with Meyersville Road and plaintiff's driveway at a common point and the actual override of plaintiff's driveway by that development street creates an unsafe intersection. The defendants have recognized--.

THE COURT: I really at this stage can't get into the merits of that. See, the most I can do at this point, Dr. Burch, is decide the-- the most I could do would be to decide that (I) prematurely dismissed the action, reinstate it, get you to flesh

out the record, you know, and then I could, maybe then sometime get to the merits of the case. But there really is no-- I just can't deal with it.

DR. BURCH: I understand. Your Honor, my questions have been rhetorical, obviously. I've been looking to see, to persuade the Court of the premature decision, not based upon-- I'm not even blaming Mr. Bernstein. I'm not doing that. That's not my purpose here.

My purpose here is to take a case of unlawful conduct on the part of a planning board and other defendants who have shown their incompetency to deal with these matters of law and bring it before your Honor for adjudication of the matters of law which are outstanding and like a burden upon me that I'm going to have to face a planning board that is proven to be incompetent and has proven to take unlawful acts.

(THE COURT continues)

THE COURT: Mr. Bernstein, the real question is whether-- the only question that I can address is whether I set aside the judgment (Summary Judgment dismissal of February 26, 1988) because we can now produce a record. The other questions I can't possibly get to until later.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
Docket No. L-9992-87

ROBERT J. BURCH Plaintiff	:	
v.	:	PRETRIAL CONFERENCE
THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS. Defendants	:	(Abbreviated) Civil Action

Place: Morris County Courthouse
Morristown, New Jersey
Date: FEBRUARY 1, 1990

BEFORE:
HONORABLE REGINALD STANTON, A.J.S.C.

TRANSCRIPT ORDERED BY: Robert J. Burch

APPEARANCES:
ROBERT J. BURCH
Pro Se

TERENCE E. HEADD, CSR
Morris County Courthouse

THE COURT: It's conceivable to me this may be bad planning. I never have gotten to the merits of the case. And actually, until I actually get to the merits of a full record, I don't decide the merits. So I don't known what I would do with this subdivision if it got approved in the form it was originally approved. I don't know whether I would sustain it or not.

ROBERT J. BURCH
17 Meyersville Road
Chatham, New Jersey 07928
(201) 635-8760
Plaintiff Pro Se 2391

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Abbreviated) DOCKET NO. 91-5446 (JWB)

ORIGINAL FILED
DEC 1 1991

Civil Action

COMPLAINT AND DEMAND
FOR JURY TRIAL

ROBERT J. BURCH :

Plaintiff :

v. :

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHAL BISSELL; RICHARD BRADLEY; PRISCILLA BECK OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. :

Defendants

---x

Plaintiff, ROBERT J. BURCH, residing at 17 Meyersville Road in the Township

of Chatham, County of Morris and State of New Jersey, complaining of the defendants, says that:

COUNT I

1. The jurisdiction of the United States District Court for the District of New Jersey is herewith invoked to hear claims founded upon alleged violations of rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, this being a suit in civil law which is authorized by law, Title 42 Sec 1983 of the U.S. Code, which is brought to redress deprivations under color of law, statute, ordinance, regulation, custom and usage of rights and privileges secured by the Constitution of the United States and by acts of Congress providing for the equal rights of citizens, as hereinafter more fully described.

(COUNT I continues)

14. The aforesaid "determinations" of the State Court arising from failure to hear or by rulings extra State law are set forth summarily in plaintiff's certification in support of motion for reconsideration to the Supreme Court, filed July 18, 1991, annexed hereto as Exhibit "A", denied October 3, 1991.

WHEREFORE, the jurisdiction of the Unites States District Court for the District of New Jersey is invoked pursuant to the authority of Title 42 USC Sec 1983, and pursuant to 28 USC Sec 1331, for hearing by trial by jury of claims arising out of willful violations of plaintiff's federally protected rights as a consequence of alleged unlawful acts of defendants under color of law as custom and practice, and for hearing on the constitutional questions of land use unheard in the State court and still in controversy, whereby

plaintiff demands that judgment be entered against the defendants as set forth in Count II through Count XVIII herein.

(EXHIBIT "A" ANNEXED TO FEDERAL COMPLAINT, DOCKET NO. 91-5446, ABBREVIATED)

ROBERT J. BURCH
17 Meyersville Road
Chatham, New Jersey 07928
(291) 635-8760
Plaintiff Pro Se

SUPREME COURT OF NEW JERSEY

DOCKET NO. 33,449
(A-2323-89T2)
DOCKET NO. 33,478
(A-4122-89T2)

FILED JUL 18 1991

Civil Action

CERTIFICATION FOR RECONSIDERATION, R.2:11-6

ROBERT J. BURCH :

Plaintiff :

v. :

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. :

Defendants

I, ROBERT J. BURCH, appearing pro se in this action, am responsible for the preparation of this Certification, which is filed in support of my motion for reconsideration of the rulings of the Supreme Court of the State of New Jersey which were filed by the Court on July 11, 1991

(EXHIBIT "A" continues)

5. Where a civil action is authorized by Title 42 Sec 1983 of the U.S. Code for hearing of grievances and claims arising out of actual deprivations of protected rights to equal treatment and due process, said deprivations as a consequence of agreements arrived at by the concerted acts of municipal and private persons in non-public and covert meetings held under color of law, as practice and custom of the municipality, the civil action may be summarily dismissed and the right to trial by jury for hearing on the merits

denied, based solely upon the determination of the State Court not to review or make findings on the evidences and proofs filed under certification with the Court which meet in full all criteria for the required substantial showing to sustain a Sec 1983 cause of action.

(EXHIBIT "A" continues)

17. When the acts of government compel a citizen to bring an action against a municipality to prevent the injury and taking of property without due process as a consequence of unlawful acts of government, as official policy to serve only private interests, and where the suit is successful in preventing the injury, the interests of justice and the public good of the community are properly served by the determination of the State Court not to review or make findings on the evidences of actual due process violations and of unlawful governmental conduct, not

to rule upon or resolve the factual and legal issues which gave rise to the writ suit in the first place and still in controversy, to preclude public exposure of the unlawful acts, accordingly condone the cover-up and permit the unlawful conduct with impunity, to deny the citizen suffering the wrongful acts of government, as well as the community as a whole, the protection of the Court against repetition of the same unlawful practices of government which are at the basis of the suit, and to deny plenary trial for recovery of costs and damages resulting from the wrongful acts of government and from the costly and consuming civil action which was necessitated by the municipality's willful and reckless violations of the laws.

18. The(se) rulings and determinations of the State Court appear to be contrary to the dictates of the due process and equal protection provisions of the

Constitution of the United States and the Constitution of the State of New Jersey.

19. The aforesaid rulings and determinations of the State Court appear to be contrary to Amendment VII to the Federal Constitution, providing for trial by jury for a cause of action as authorized by Title 42 Sec 1983 of the U.S. Code.

20. The rulings and determinations of the State Court appear to be contrary to the State's policy of uniform land use regulations, said policy arising from the equal protection clause of the Fourteenth Amendment to the Federal Constitution and embodied in the State's Municipal Land Use Law and other applicable State statutes.

21. Accordingly, and in consideration of the potential or probable precedential nature of the aforesaid rulings and determinations of the State Court, plaintiff-appellant respectfully requests reconsideration of petitions for

certification and appeals by the full complement of the (judges) of the Supreme Court.

I hereby certify that all of the aforesaid statements made by me are true. I am aware that if any of the foregoing statemants made by me are willfully false, I am subject to punishment.

Respectfully

submitted,

ROBERT J. BURCH
Plaintiff pro se

DATE: JULY 18, 1991

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
DOCKET No. L-9992-87

FILED: OCT 22 1987

Civil Action

AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRIT, ETC. (Abbreviated)

(Demand For Trial By Jury As To Count IV)

ROBERT J. BURCH :

Plaintiff :

v. :

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. :

Defendants

---x

Plaintiff, ROBERT J. BURCH, residing at 17 Meyersville Road, in the Township of Chatham, County of Morris and State of New Jersey, complaining of the

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
DOCKET NO. MRS-L-1194-88

FILED: APR 4 1988

Civil Action

COMPLAINT
IN LIEU OF PREROGATIVE
WRIT, ETC.

(Demand For Trial By Jury
As To COUNT V)

----------x

ROBERT J. BURCH

Plaintiff

v.

THE TOWNSHIP OF CHATHAM

Defendant

----------x

Plaintiff, ROBERT J. BURCH, residing at 17 Meyersville Road, in the Township of Chatham, County of Morris and State of New Jersey, complaining of the Defendant, says that:

FIRST COUNT

1. At all times hereinafter mentioned, Plaintiff was and continues to be an owner

17 Meyersville Road
Chatham, New Jersey 07928
June 9, 1988
(201) 635-8760

Burch v. The Planning Board of Chatham Township, et. al.

DOCKET NO. L-9992-87
DOCKET NO. A-3398-87T6

Reconsideration
(Abbreviated)

The Honorable Reginald Stanton, A.J.S.C.
Superior Court of New Jersey
Courthouse
Morristown, New Jersey 07960

Dear Judge Stanton,

(Reconsideration continues)

You have recently reaffirmed your determination not to reverse the aforesaid Order of February 26, 1988, thus necessitating a motion to the Appellate Division for reconsideration of dismissal of my appeal.

Upon careful review of this matter, I believe that Your Honor did not intend by summary dismisssal of my Amended

Complaint to deny me my right under law to a fair and impartial hearing of meritorious claims under a 42 USC Sec 1983 cause of action, or to cover up and prevent public exposure of the unlawful conduct of defendants and palpable abuse of public authority to profit a private developer and the Municipality. To these matters this request for reconsideration of your determinations is directed.

It is noted at the outset that this controversy does not involve proper exercise of the powers of eminent domain, or is there a substantial public interest involved.

The matters before you and under appeal, set forth in detail in the pleadings, involve substantial deprivations of Plaintiff's (Plaintiff-Appellant) federally protected rights to the holding, use, enjoyment and disposal of his property, by private persons motivated solely by

profit, said deprivations arising from the conduct of the Municipality and its Planning Board whose officials, employees and servants aided and abetted and acted in concert with the private defendants under color of law and with reckless an callous indifference to the consequences to Plaintiff and to the public.

The defendants did so act, in part, in return for an improper or illegal payment of money demanded by the public defendants and received from the developer which assured approval of his application without consideration of variances, in violation of statute and with deliberate disregard of the adverse impact of the subdivision on Plaintiff's property and property rights.

This cause of action under statute and 42 USC Sec 1983 was necessitated to protect my property against unlawful taking and destruction, at great cost to me of money, time and effort. This action would

not have been necessary at all if the defendants had complied with the laws they were entrusted with and obligated to uphold. Moreover, for more than four years I have been subjected to emotional and mental stress and have been deprived of a normal life in my home as a consequence of the improper and unlawful conduct of the defendants and the unrelenting threats to my property.

I have come before this Court seeking relief by due process and the protection of the Court. Your Order of February 26, 1988 Dismissing Action and Remand, and your recent rulings, denies to me, no matter inadvertent, the fundamental and inalienable rights guaranteed by the Constitution and embodied in Federal and State statutes to a just and impartial hearing, redress and protection of the law. I also claim that Your Honor has been deceived by the defense into dismissing the Amended

Complaint which inadvertently gives tacit judicial approval to and cover up of the improper and illegal conduct of the defendants, and which irreparably compromises the deterrent power of the law.

17 Meyersville Road
Chatham, New Jersey 07928
September 7, 1988
(201) 635-8760

Burch v. The Township of Chatham
DOCKET NO. MRS-L-1194-88
Burch v. The Planning Board of the Township of Chatham, et. al.
DOCKET NO. L-9992-87

(Abbreviated)

The Honorable Reginald Stanton, A.J.S.C.
Superior Court of New Jersey
Courthouse
Morristown, New Jersey 07960

Dear Judge Stanton,

(Letter continued)

The aforesaid Order Dismissing Action of February 26, 1988, summarily dismissed all counts of plaintiff's Amended Complaint, contrary to the Rules of the Courts and relevant law herebefore set forth, when discovery was just initiated and just in progress, without consideration of plaintiff's facts and evidences of palpable abuse of public authority to profit a private developer in return for an unlawful

enrichment of the Municipality, and without hearing of claims of willful deprivation of plaintiff's federally protected rights under color of law with consequential financial, property and personal losses to the plaintiff. R.4:462; R.46-5. Bilotti v. Accurate Forming Co., 39 N.J. 184 (1963); Carey v. Pipus, 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042 (1978); Schuer v. Rhodes, 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 (1974); E. Rutherford Indus. Park v. State, 119 N.J. Super 352 (L 1972); T.&M. Homes Inc. v. Twp. of Mansfield, 162 N.J. Super 497 (1978); Owen v. City of Independence, 445 US 622, 63 L Ed 2d 673, 100 S Ct 1398 (1980).

Your Honor was apparently deceived by defense counsel's misleading and false statements into dismissing the Amended Complaint on February 26, 1988 for specious reasons, inadvertently giving tacit judicial approval to and cover up of the unlawful

conduct of the defendants, which not only impairs public confidence in the operations of government but brings under question the ability of the courts to deal effectively with public corruption under the reason of law.

Within this case, I have brought before Your Honor sufficient facts and evidences for judicial review and determination as to the nature of the improper or illegal payment of money to the Municipality by the private developer in return for approval of his subdivision, in the context of other improper or unlawful acts of the defendants, as one more question of law. While perhaps I can understand a reluctance by the civil court to hear evidences of corruption and make adverse determinations involving a public entity, I also have an obligation, because of the substantial public trust violated, to bring this matter before the appropriate public forums for review.

Accordingly, I have set forth a summary of my concerns to the executive branch of the State so that appropriate action may be taken as warranted. I am hopeful, for the sake of the persons involved, that there shall not be cause for this matter to proceed beyond assuring deterrence of those who would tend to adopt such forms of action in the future.

On all other matters of this case, I believe that I am entitled to a fair and impartial hearing of evidences of palpable abuse of authority by a Municipality and its Planning Board, and of the meritorious claims stemming therefrom under a 42 Sec 1983, 1985 and 1986 cause of action, for which substantial showing has already been made.

Accordingly, I respectfully request that Your Honor grant Plaintiff's said Motion and enter the form of order submitted to Vacate Prior Order And Consolidation.

MEMORANDUM OF LAW

DOCKET NO. L-9992-87

TO: Hon. Reginald Stanton, A.J.S.C.

From: Robert J. Burch, Plaintiff pro se

Date: January 25, 1989

Subject: Answer To Motion Of Defendant-Counterclaimant Charles Kurebanas To Reinstate Counterclaim

(MEMORANDUM continues)

The Court's ruling on February 26, 1988 not to review or make determination on the evidences of constitutional violations (Amend. V and XIV) and deprivations of federally protected rights under 42 USC Sec 1983, precludes, in the first instance, any claims by Defendant Kurebanas that he has prevailed or has met any of the essential legal criteria for asserting that plaintiff's underlying action was "frivolous, unreasonable or without foundation".

Moreover, it is inconceivable under

the most basic precepts of substantive law that Plaintiff is denied, by summary dismissal of his Complaint (on February 26, 1988), a fair and impartial hearing of a meritorious cause of action under 42 USC Sec 1983, while at the same time plaintiff must defend against a patently frivolous counterclaim based in the same facts and questions of constitutional law as the underlying Complaint, for legal fees under 42 USC Sec 1988. Bennett v. Cramer, D.C. Wis. 1980, 495 F. Supp. 191. The chilling effect arising from punishment of Plaintiff for his diligent pursuit of this constitutional rights violates the liberal construction (of) and thwarts the congressional purpose of encouraging compliance with and enforcement of the civil rights laws. Collins v. Chandler Unified School Dist., C.A. Ariz. 1981, 644 F. 2d 759.

17 Meyersville Road
Chatham, New Jersey 07928
August 31, 1989
(201) 635-8760

Burch v. The Planning Board
Of Chatham Township, et. al.
Docket No. L-9992-87
Burch v. The Township of
Chatham
Docket No. MRS-L-1194-88

The Hon. Reginald Stanton, A.J.S.C.
Superior Court of New Jersey
Courthouse
Morristown, New Jersey 07960

Dear Judge Stanton,

Enclosed herewith please find Certification with regard to certain matters in connection with the above titled civil actions.

As you may be aware, I am extremely frustrated and upset by the judicial process as a consequence of the Court three (3) times summarily disposing of the Fourth Count of the underlying complaint for which substantial showings have been made, and two (2) times reversing the orders of the Court by reinstating patently frivolous

counterclaims following plaintiff's filing appeals as of right (with the Appellate Division). As a consequence, what appears to be required is new legislation and/or changes in the rules governing the courts. My intention is to proceed accordingly.

Throughout the two years of these litigations, I have endeavored to deal only in facts and truths and inferences reasonably drawn therefrom. In accordance with that objective, I respectfully request that Your Honor review the enclosed Certification for any facts or conclusionary statements which maynot conform to the evidences and proofs filed with you in the pleadings and on June 9, 1989.

I would appreciate your considered response to this most serious matter.

Respectfully

ROBERT J. BURCH
Plaintiff pro se

POST-ORDER CERTIFICATION
AUGUST 31, 1989
(Abbreviated)

Burch v. The Planning Board
Of Chatham Township, et. al.
Docket No. L-9992-87
Burch v. The Township Of
Chatham
Docket No. MRS-L-1194-88

4. The evidence and proofs acquired under oath or certification and filed within the documents submitted to the Court--received no reference by or opinion from the Court, and were not reviewed by or ruled upon by the Court at hearing on July 27, 1989, as to the effect of such evidences and proofs upon the ruling of the Court to deny Plaintiff's Motion To Reinstate The Amended Complaint (L-9992).

5. As a consequence of the determination of the Court on July 27, 1989, to summarily dispose of Plaintiff's motions without notice (of), review (of), opinion (on), or ruling on the aforesaid evidences and proofs submitted, all matters covered by the evidences are not currently before the Superior Court.

17 Meyersville Road
Chatham, New Jersey 07928
September 12, 1989
(Abbreviated)

The Hon. Thomas H. Kean
Governor of the State of New Jersey
125 West State Street
Trenton, New Jersey 08625

Dear Governor Kean,

During the course of civil litigations involving the Township of Chatham as a defendant, it became known that certain officials, agents, employees and servants of the Township acted in concert with a private developer in non-public and covert meetings, held under color of law, to obtain an improper or unlawful money payment for the Municipality from the developer as a condition of approval of a subdivision which does not comply with zoning regulations and law, by procedures in violation of statute and due process.

Said conduct of the Municipality had consequences which deprived us of rights

to property as guaranteed under the due process and equal protection clauses of the Federal Constitution, and pursuant to Title 42 USC Sec 1983, 1985 and 1986 for deprivations of federally protected rights under color of law. The acts of the Municipality necessitated instituting two very consuming civil actions to prevent our property from unlawful taking and to prevent creation of a dangerous intersection, actions at great cost to ourselves and to the taxpayers, which would not have been necessary at all if the Municipality had not violated the laws it was entrusted to uphold.

(LETTER continues)

The evidences and proofs of the aforesaid wrongful or unlawful demand and payment of money, and its coupling with the concerted acts of municipal and private persons at non-public and covert meetings under color of law for the purpose of

subverting z ing laws, have been filed under oath or certification with the Law Division of the Superior Court of Morris County. However, as the Court has made the determination not to give opinion on, or to publicly review or rule upon the said evidences and proofs during the course of civil litigation, the matter is not currently before the Court.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4122-89T2

----------x

ROBERT J. BURCH		Civil Action
Plaintiff	:	On Appeal
v.		From The
	:	Superior Court
THE TOWNSHIP OF CHATHAM;		Of New Jersey
THE PLANNING BOARD OF	:	Law Division
CHATHAM TOWNSHIP; JEFFREY		Morris County
TAYLOR; ROBERT KIRKPATRICK	:	
MARSHAL BISSELL; RICHARD		Hon. Reginald
BRADLEY; PRISCILLA BECK	:	Stanton,A.J.S.
OTTO VOPELIUS; GAYLE	:	C. Presiding
WILLIAMS; DONALD MALEHORN;		
CHARLES KUREBANS; SOCRATES	:	
KYRITSIS.		
Defendants		

----------x

BRIEF FOR PLAINTIFF-APPELLANT ROBERT J. BURCH

ROBERT J. BURCH
Plaintiff pro se
17 Meyersville Road
Chatham, N.J. 07928
(201) 635-8760

On the Brief
Robert J. Burch

(Abbreviated)

CONCLUSION

The uncontroverted and unrefuted evidences filed with the Law Division by plaintiff under certification in lieu of oath clearly meet the criteria of a substantial showing to maintain the FOURTH COUNT of the Amended complaint bearing Docket No. L-9992-87, filed October 22, 1987.

Plaintiff and the public should no longer be denied a proper hearing of the evidences and proofs of wrongful and unlawful conduct of municipal officials, employees and servants, and of municipal and private attorneys as officers of the court, who violated laws they were entrusted to uphold, with callous and reckless indifference to plaintiff's rights guaranteed by the due process and equal protection clauses of the Federal Constitution, and to the community as a

whole, to serve only private interests.

Plaintiff respectfully requests entry of an order reinstating the FOURTH COUNT for hearing by trial by jury of grievances and claims arising from constitutional violations and deprivations of federally protected rights under a 42 USC Sec 1983, 1985 and 1986 cause of action, as set forth in the FOURTH COUNT of the Amended Complaint.

Respectfully submitted

ROBERT J. BURCH
Plaintiff pro se

DATED: JUNE 22, 1990

SUPREME COURT OF THE STATE OF NEW JERSEY

DOCKET NO. 33,478

ROBERT J. BURCH Plaintiff-Appellant v. THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHAL BISSELL; RICHARD BRADLEY; PRISCILLA BECK OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. Defendants	Civil Action : Petition for Certification : To The Appellate Division, Docket No. A-4122-89T2 Sat Below: : Judge Antel : Judge Keefe

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BRIEF AND SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR CERTIFICATION OF PLAINTIFF-APPELLANT ROBERT J. BURCH

ROBERT J. BURCH
Plaintiff pro se
17 Meyersville Road
Chatham, N.J. 07928
(201) 635-8760

On the rief
Robert J. Burch

(Abbreviated)

NATURE OF APPEAL

to the

SUPREME COURT OF THE STATE OF NEW JERSEY

The Law Division and the Appellate Division of the Superior Court of New Jersey have made the determination not to permit public hearing by plenary trial of a Title 42 Sec 1983 civil rights action for which all criteria for the required substantial showing have been met in full.

The evidences and proofs of willful and reckless deprivations of federally secured rights to due process and equal treatment as a consequence of wrongful and unlawful governmental conduct in connection with approval of a subdivision which is not in compliance with ordinance or statute, by means in subversion of law granted in exchange for an illegal cash payment, remain wholly unrefuted.

The Superior Court rendered opinion

based upon inferences most favorable to the municipal and private defendants-respondents drawn from the unsupported assertions of denial of wrongdoing in the pleadings of the defendants-respondents, while at the same time the Court disregarded the evidences and proofs submitted by the plaintiff-appellant under certification to the Court, failed to review, make findings on or otherwise act upon the evidences, and failed to make a ruling on, or even acknowledge the existence of the complete record below which supports the civil rights and in lieu of prerogative writ action.

As a consequence, whether by error, inadvertence or otherwise, the denial of protected rights by the unlawful conduct of public officials and employees and of attorneys acting under color of law has received the tacit judicial approval of the Court.

Accordingly, the Supreme Court may wish to review the determination of the Superior Court to deny public exposure in a plenary hearing of the substantial evidences of wrongful governmental conduct for a Sec 1983 cause of action, as a determination which is in conflict with prior Federal and State decisions, is in conflict with Congressional purpose for the civil rights statutes, and is contrary to the official policy and practices of the courts of the State of New Jersey, as a matter of substantial public importance and in the interests of justice.

UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOCKET NO. 91-5446 (JWB)

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ROBERT J. BURCH :

Plaintiff :

v. :

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFF TAYLOR; ROBERT KIRKPATRICK MARSHAL BISSELL; RICHARD BRADLEY; PRISCILLA BECK OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. :

Defendants

----------x

Civil Action

Summary Judgment
Count I

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT I

ROBERT J.BURCH
Plaintiff pro se
17 Meyersville Road
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(201) 635-8760

Date for oral argument
April 13, 1992

(Abbreviated)

POINT I

FAILURE OF THE STATE COURT TO GRANT HEARING ON THE MERITS OR MAKE DETERMINATION ON THE CERTIFIED EVIDENCES FILED IN SUPPORT OF CLAIMS BROUGHT UNDER TITLE 42 SEC 1983 BARS THE DEFENSE OF RES JUDICATA OR COLLATERAL ESTOPPEL.

Over the four years of intense litigation from fall 1987 through summer of 1991, the courts of the State of New Jersey have denied plaintiff hearing on the merits by trial-by-jury, or otherwise, of claims arising out of alleged deprivations of federally secured rights as a consequence of unlawful governmental conduct in a conspiracy under color of law.

(BRIEF continues)

An annotated synopsis of the procedural history of the disposition of the original complaints (L-9992-87 & MRS-L-1194-88) is set forth herein and in POINT II, with

relevant supporting documents, in support of plaintiff invoking the jurisdiction of the Federal District Court for hearing of constitutional issues not heard in the Law Division of the Superior Court of New Jersey, addressed only superficially by argument without benefit of testimony or review of evidences by a "trial-by-brief" in the Appellat Division, and denied review or remand by the Supreme Court of New Jersey.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 92-5290

ROBERT J. BURCH	: Civil Action
Plaintiff	: On Appeals From
v.	The United States
	: District Court
THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHAL BISSELL; RICHARD BRADLEY; PRISCILLA BECK OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS.	For The District Of New Jersey. Docket No. 91-5446
	: Hon. John W. Bissell, USDC Presiding
Defendants	

BRIEF
and
APPENDIX FOR PLAINTIFF-APPELLANT

ROBERT J. BURCH
Plaintiff pro se
17 Meyersville Road
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(201) 635-8760

On the Brief
Robert J. Burch

(Abbreviated)

ISSUES FOR REVIEW

1. The primary issue for review is to whether the original jurisdiction of the District Court is properly invoked under the authority of 42 USC Sec 1983 (grant of plaintiff's motion for summary judgment on Count I) for hearing of grievances and claims founded upon alleged violations of protected rights by unlawful acts of government, with reliance by the plaintiff upon the evidences and proofs within the personal knowledge of the plaintiff and filed under oath with the District Court of the indisputable factual proceedings in the Law Division of the State Superior Court which bar the defense of issue and claim preclusion. POINT II herein.

2. Did the District Court err in granting the motion of the municipal defendants to dismiss the complaint pursuant

to Fed. R. Civ. P. 12(b)(6) on the defense of preclusion, where the Court relied for its opinion and judgment to dismiss solely upon the inadmissible heresay evidence (opinions of the State Appellate Division) from which the District Court drew conclusionary findings wholly contrary to the indisputable factual record of the proceedings in the State Law Division? POINT III herein.

3. Did the District Court abuse discretion in failing to rule upon, consider, admit, exclude, make finding, take notice, or otherwise in any way acknowledge the existence of the substantial evidences and proofs within plaintiff's personal knowledge and filed under affidavit which bar the defense of preclusion, while at the same time the Court relied upon the single inadmissible heresay evidence filed by the municipal defendants to justify its decision to dismiss the complaint on the grounds of preclusion? POINT IV herein.

CONCLUSION

It is a clear and unmistakable fact established by the preponderance of admissible evidence within the personal knowledge of the plaintiff and filed under affidavit with the District Court, and said proofs not controverted by any adverse admissible evidence, that the plaintiff has been denied the opportunity, all and singularly by and in the State courts, to litigate the constitutional issues and claims brought under the authority of Title 42 USC Sec 1983 and arising out of the wrongful and unlawful conduct of local government.

Accordingly, the defense of issue and claim preclusion is barred as grounds for dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the order of the District Court granting the muinicipal defendants' motion to dismiss on said grounds should be vacated.

DATE: AUGUST 14, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 92-5290

ROBERT J. BURCH Plaintiff v. THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK MARSHAL BISSELL; RICHARD BRADLEY; PRISCILLA BECK OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANS; SOCRATES KYRITSIS. Defendants	Civil Action On Appeal From The United States District Court For The District Of New Jersey. DOCKET NO. 91-5446 Hon. John W. Bissell, USDC, Presiding

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REPLY OF PLAINTIFF-APPELLANT

ROBERT J. BURCH
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17 Meyersville Road
Chatham, NJ 07928
(201) 635-8760

On the Brief
Robert J. Burch

Reply of Plaintiff-Appellant.
The United States Co of Appeals.
(Abbreviated)

To the Honorable Judges of the United States Court of Appeals, I bring before you a matter of grave importance bearing upon the obligation of the courts as the trustees of the right of each citizen to the equal protection of the laws. Constitu. Amend. XIV.

This case, now on appeal from the decision of the Federal District Court to dismiss the case, is to whether a civil rights action brought in the New Jersey State courts to hear claims founded upon alleged violations by government of rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment, that action summarily dismissed by the State Law Division in 1988 without hearing on the merits in an improper summary judgment disposition and all appeals to the courts for hearing denied, should be

reinstated for proper determination within the jurisdiction of the federal courts as authorized by Title 42 USC Sec 1983.

The original civil rights action brought in the Law Division in 1987 under the mandate of the entire controversy doctrine has been skewed by the courts into a more fundamental matter involving the right of each citizen to the equal protection of the laws through the fair and equitable dispensation of procedural due process within the proceedings of the courts.

After five years of costly and wasted litigation in the State courts and in the Federal District Court on appeals just to be heard, there has emerged a clear and pervasive pattern of discretionary judicial procedure which has precluded all opportunity to litigate the constitutional issues and claims arising out of the wrongful and unlawful conduct

of local government. That is, where the State Law Division at the outset of the case had decided not to permit public exposure by trial of the alleged (mis)conduct of government which compelled this plaintiff to bring this cause of action, the State (and Federal) courts find justification for the decision by willful ommission of any ruling or other consideration upon the substantial evidences and proofs filed by plaintiff under oath which confirm the allegation of the complaint, while at the same time drawing inferences most favorable to the defendants from the bare assertions of the defense lawyers for government unsupported by any admissible evidence.

This discretionary procedure of the courts, not to consider, (not to) admit, (not to) exclude, (not to) rule upon, (not to) make finding upon, or otherwise even acknowledge the existence of the evidences

and proofs of wrongful government conduct, has the consequence of suppression of the truth and of precluding a fair and just determination of the fundamental constitutional issues underlying this case; and by thus tacitly condoning the alleged acts of government, denies me the protection of law against repetition of government transgressions. Fed. R. Evid. R.102, et. seq.; Constitu. Amend. XIV.*

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*Federal Rules of Evidence, R.102:

"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Supreme Court, U.S.
APR 27 1993

No. 92-1585

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BURCH,

Petitioner,

-v-

THE TOWNSHIP OF CHATHAM, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

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RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether the case was properly dismissed on the basis of *res judicata* or claim preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

2. Whether the case was properly dismissed on the basis of collateral estoppel or issue preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

LIST OF PARTIES

The parties in this matter and in the proceedings below are the same and include Robert J. Burch, Petitioner-Plaintiff, and Respondent- Defendants, The Township of Chatham, The Planning Board of Chatham Township, Jeffrey Taylor, Robert Kirkpatrick, Marshall Bissell (deceased), Richard Bradley, Priscilla Beck, Otto Vopelius, Gayle Williams, Donald Malehorn, Charles Kurebanas, and Socrates Kyritisis.

LIST OF COMPANIES PURSUANT TO RULE 29.1

Respondent, The Township of Chatham, is a municipal corporation of the State of New Jersey and neither it nor Respondent, The Planning Board of Chatham Township, has any parent company, subsidiary or affiliate.

No. 92-1585

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BURCH,

Petitioner,

vs.

THE TOWNSHIP OF CHATHAM, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

OPINIONS BELOW

By written opinion dated April 23, 1992, the United States District Court for the District of New Jersey dismissed Plaintiff-Petitioner's federal complaint on the basis that the claims set forth therein were barred by *res judicata* or claim preclusion and by

collateral estoppel or issue preclusion. The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court on December 31, 1992. Plaintiff-Petitioner ("Petitioner") seeks review of the Third Circuit's Judgment Order which affirmed the unpublished, written decision of the District Court. [1]

COUNTERSTATEMENT OF THE CASE

Petitioner Robert J. Burch is a resident of the Township of Chatham, New Jersey. On December 15, 1991, Petitioner filed a prolix and somewhat incomprehensible eighteen count (sixty-six page) complaint in the District Court for the District of New Jersey alleging various land use violations and the violation of constitutional and civil rights under 42 U.S.C. §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, as well as certain individual Planning Board members.

To the extent comprehensible, the allegations set forth in the federal complaint had been previously pleaded, litigated, and adversely adjudicated against Petitioner in both the trial and appellate courts of the Superior Court of New Jersey in two prior companion cases. The Supreme Court of New Jersey declined to

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1. The District Court's unpublished, written opinion is reproduced in full in Appendix A to this Brief (at Ra1 to 14). The prior unpublished, written opinions of the Superior Court of New Jersey which are both dated March 8, 1991 and which are annexed to the District Court's written opinion are reproduced in full in this Brief as Exhibits B (Ra15 to 19) and C (Ra20 to 23), respectively. The District Court's Order dismissing Petitioner's Complaint is reproduced in Petitioner's Appendix (at Pa3 to 4) and the Judgment Order of the Third Circuit is reproduced in Petitioner's Appendix (at Pa1 to 2). As used herein, "Pb" refers to Petitioner's Brief, "Pa" refers to Petitioner's Appendix, and "Ra" refers to Respondents' Appendix.

grant certification in the companion cases, and denied Petitioner's applications for reconsideration.

Despite taking full advantage of the State judicial process and exhausting his appeals therein, Petitioner combined the adversely adjudicated allegations of both of his State court claims into his federal complaint, referenced the previously adjudicated State court proceedings in his federal complaint, and attempted to relitigate the same claims against the same parties in federal court. The District Court dismissed Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion. (Ra7 to 11). The Third Circuit affirmed the decision of the District Court and entered a Judgment Order. (Pa1 to 2).

The pertinent facts involving this matter and the underlying companion cases were addressed by the District Court and are summarized herein. (Ra2 to 6). On or about June 1, 1987, over Petitioner's objections, the Chatham Township Planning Board granted preliminary approval to the subdivision application filed by Respondent, Socrates Kyritsis. The preliminary approval authorized Kyritsis to construct a proposed residential development (Sycamore Hill) on property adjacent to Petitioner's residential property.

On or about June 15, 1987, Petitioner filed the first of two State court actions against the Respondents, captioned *Burch v. The Planning Board of Chatham Township, et al.*, (Docket No. L-9992-87) (the "subdivision case"). The first three counts of the four count complaint alleged that the Chatham Township Planning Board and its members had violated applicable land use laws and municipal ordinances in approving the development application. The fourth count of the complaint alleged that Petitioner's constitutional and civil rights under 42 U.S.C. § 1983 had been violated by the Respondents.

The trial court dismissed counts one through three of the complaint and remanded the entire development application to the Planning Board due to a defective record.[2] The trial court dismissed the fourth count of the complaint against the individual Planning Board members and representatives because they were immune from Petitioner's 1983 claims as a matter of controlling New Jersey law. The trial court found no violation of Petitioner's constitutional or civil rights by the Township or its Planning Board and entered summary judgment dismissing the remainder of the fourth count.

Despite Petitioner's partial victory in "overturning" the subdivision approval, Petitioner appealed the case. After oral argument, the Appellate Division of the Superior Court of New Jersey issued an unpublished, written opinion wherein the court affirmed the trial court's disposition of the "subdivision" case in all respects. (Ra15 to 19). The Appellate Division specifically reviewed and rejected Petitioner's allegations regarding any violation of his constitutional or civil rights.

The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

On April 4, 1988 Petitioner filed his second State lawsuit captioned *Burch v. The Township of Chatham,* (Docket No . MRS-L-1194-88) (the "ordinance case"). Therein, Petitioner challenged

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2. The record (*i. e.*, tapes) from two Planning Board meetings wherein the Kyritis development application was discussed could not be found and was either lost or destroyed, and certain Planning Board members who had voted on the application were unable to certify that they had reviewed the tapes of the Planning Board meetings from which they were absent, thereby violating the requirements of the New Jersey Municipal Land Use Law. N.J.S.A. 40:55D-1 *et seq.*

the validity of an amendment to Chatham Township Land Use Ordinance 2-88, on state law grounds, as well as upon the ground of alleged infringement of Petitioner's constitutional and civil rights. The import of amended zoning ordinance 2-88 was ". . . that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land." (Ra22). The effect of Ordinance 2-88 was to save Petitioner's lot (and similarly situated lots) from non-conformity with applicable zoning regulations.[3]

After a three-day trial, the trial court sustained the validity of the amended zoning ordinance, and concluded that Petitioner's constitutional and civil rights had not been violated. Petitioner again filed an appeal.

After oral argument, the "ordinance" case was sustained on appeal in all respects by the Appellate Division of the Superior Court of New Jersey. (Ra20 to 23). The Appellate Division specifically reviewed and rejected Petitioner's allegation that his constitutional and civil rights had been violated. The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

Despite the fact that Petitioner's companion State court lawsuits had been adversely adjudicated on the merits at both the trial and appellate levels, Petitioner combined the allegations of both of his State court complaints into the subject federal

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3. The proposed access street to the Kyritsis subdivision was to have been constructed along the easterly boundary of Petitioner's lot and would have converted Petitioner's interior lot into a corner lot. If same was constructed, Petitioner's lot would have fronted on two streets. Ordinance 2-88 prevented Petitioner's lot (and similarly situated lots) from becoming nonconforming with the municipal land use requirements of Chatham Township.

complaint (Pb32, admission of Petitioner), and attempted to circumvent the unfavorable State court adjudications and to relitigate the same issues against the same parties in federal court. The following table provides a shorthand analysis of Petitioner's federal complaint (eighteen counts), as well as the corresponding prior State court complaints (and counts), and the respective State court appellate decisions wherein the same or similar issues were considered and adversely adjudicated against Petitioner.[4]

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4. This table was submitted to the District Court and to the Third Circuit. No objection was made by Petitioner. The table has been modified to reflect the disposition of the companion cases made by the State appellate courts.

FEDERAL COMPLAINT COUNT	DESCRIPTION OF SUBJECT MATTER OF FEDERAL COMPLAINT COUNTS	SUBDIV. SUIT COUNT	ORD. SUIT COUNT	SUBDIV. DECIS.- PAGE	ORD. DECIS.- PAGE
I	Invokes this Court's jurisdiction by alleging violations of Plaintiff's constitutional rights pursuant to 42 U.S.C. § 1983.	1,2,4	3,5	2,4 (Ra16 to 19)	3 (Ra22 to 23)
II	Seeks relitigation of land use issues previously raised, as well as allegation of constitutionally protected property right in the application of a zoning ordinance's setback requirement.	2,4	3,4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
III	Seeks relitigation of zoning issues previously raised.	3,4,5	1,2,3 4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
IV	Seeks relitigation of Plaintiff's objections to Chatham Township's enactment of Ordinance 2-88.	1	3,5	4 (Ra18 to 19)	3,4 (Ra22 to 23)

V	Seeks relitigation of issues raised in both the "subdivision" case, and the "ordinance" case.	4	1,2,3 4,5	3-4 (Ra17 to 19)	3 (Ra22 to 23)	
VI	Seeks to overrule and relitigate the land use and zoning determinations made by the state courts.		2,3,4		3 (Ra22 to 23)	
VII	Seeks to relitigate Plaintiff's claim regarding zoning ordinance 2-88, and the related land use issues.	4	5	4 (Ra18 to 19)	3 (Ra22 to 23)	8
VIII	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other alleged conduct of defendants.	4	5	3-4 (Ra17 to 19)		

IX	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township in return for alleged favorable treatment.	4	5	3-4 (Ra17 to 19)	
X	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other land use issues.	4	5	3-4 (Ra17 to 19)	
XI	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	1	1	3-4 (Ra17 to 19)	3 (Ra22 to 23)

XII	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	3,4	2	3-4 (Ra17 to 19)	
XIII	Alleges that Planning Board attorney Malehorn conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	3-4 (Ra22 to 23)
XIV	Alleges that Township Engineer Kirkpatrick conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	

XV	Alleges covert meetings and conspiracy between the municipal and private defendants.	4		3-4 (Ra17 to 19)		
XVI	Alleges defendants Kyritsis and Kurebanas participated in alleged conspiracy and acceded to Township demands for $125,000 cash payment.	4		3-4 (Ra17 to 19)		
XVII	Alleges suggestions of Morris County Planning Board about sub-division went unheeded by defendants.		5		3-4 (Ra22 to 23)	
XVIII	Alleges Plaintiff denied due process at Planning Board, trial and appellate levels by the actions of defendants.	1,2,3,4	1,2,3, 4,5	3-4 (Ra17 to 19)	3-4 (Ra22 to 23)	

In all respects, the allegations set forth in Petitioner's sixty-six page federal complaint had been pleaded, raised, and adversely adjudicated against Petitioner in the prior companion State court proceedings. On April 13, 1992, after review of the briefs submitted by all parties and oral argument, the District Court dismissed Petitioner's federal complaint on the ground of *res judicata* or claim preclusion and on the ground of collateral estoppel or issue preclusion. (Ra6 to 11). The Third Circuit affirmed the unpublished, written opinion of the District Court by Judgment Order dated December 31, 1992. (Pa1 to 2).[5]

SUMMARY OF RESPONDENTS' OPPOSITION TO BURCH'S PETITION FOR CERTIORARI

Petitioner has not presented this Court with any substantial issue meriting review. The District Court's dismissal of Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion was affirmed without opinion by the Third Circuit on the basis of the dispositive, written opinion of the District Court. The District Court's decision is in all respects an unremarkable decision, it does not conflict on any point of law with the decision of any other court, and it does not in any other way call for the exercise of this Court's supervisory powers. Rather, Petitioner merely seeks to have this Court review the District Court's factual and legal findings, in which the Third Circuit concurred, and reverse its decision on this ground alone. Because the record is clear that the courts below did not commit any error, let alone a "very obvious and exceptional show[ing] of error," intervention by this Court is

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5. To date, the Sycamore Hill subdivision has not been constructed. Another sudivision application to the Chatham Township Planning Board would apparently be required to permit Respondent, Socrates Kyritsis, to develop or construct a subdivision. Petitioner, of course, would be permitted to object to any development application or approvals sought by Respondent, Socrates Kyritsis.

neither necessary nor appropriate. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see also, Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS BELOW PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF *RES JUDICATA* OR CLAIM PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDGED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

The District Court properly dismissed Petitioner's federal complaint on the basis of *res judicata* or claim preclusion. (Ra7 to 10). Even though sensitive to the fact that the Petitioner was a *pro se* litigant, the District Court recognized beyond doubt that the Petitioner was attempting to relitigate the same causes of action (against the same parties) which had been previously litigated and adversely adjudicated in two companion cases in the State courts of New Jersey. Indeed, the Petitioner has admitted that his federal complaint is a "consolidation" of his prior state court complaints. (Pb32).

The District Court recognized beyond doubt that Petitioner could demonstrate no legal theory which had not been previously raised and adjudicated in the State court proceedings. (Ra6 to 10); Fed. R. Civ. P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nonetheless, after having twice taken full advantage of the State judicial process and exhausting his appeals therein, the Petitioner continues his attempt to circumvent unfavorable final judgments on the merits in the State court proceedings by attempting to relitigate the same claims against the same parties in federal court.

Pursuant to the full faith and credit statute, proceedings within state court " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons*, 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). Thus, a federal court should generally " 'give the same preclusive effect to a state court judgment as another court of that state would give.' " *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3d Cir. 1989) (quoting *Parsons Steel, Inc. v. First Alabama Bank*, 474 U. S. 518, 523 (1986)). It is equally clear that civil rights actions, instituted pursuant to 42 U.S.C. § 1983, are bound by this rule. *Id.* (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) ; *Allen v. McCurry*, 449 U. S. 90 (1980)); *Krison v. Nehls*, 767 F.2d 344, 347-48 (7th Cir. 1985).

Moreover, the full faith and credit statute mandates that the federal court employ the preclusion law of the jurisdiction in which judgment was rendered. *Marrese*, 470 U.S. at 380; *McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 271 (3d Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Pittman v. LaFontaine*, 756 F. Supp. 834, 841 (D.N.J. 1991); 1B J. Moore, *Moore's Federal Practice* ¶ 0.406[1], at 272 (2d ed. 1992). The District Court, therefore, properly employed and applied New Jersey law in reaching the conclusion that Petitioner's claims were barred by *res judicata* or claim preclusion. (Ra7).

The Supreme Court of New Jersey recently reviewed the doctrine of *res judicata* in *Watkins v. Resorts Intern. Hotel & Casino*, 124 N.J. 398 (1991). Speaking in terms of claim preclusion[6], and noting that federal law and New Jersey law were

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6. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Pittman v. LaFontaine*, 756 F. Supp. 834, 841 (D.N.J. 1991) (quoting *McNasby Crown Cork & Seal Co.*, 888 F.2d 270, 275 (3d Cir. 1989) *cert. denied*, 494 U. S. 1066 (1990)).

the same, the court set forth the three basic elements required in New Jersey for claim preclusion or *res judicata*:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. *Federated Dep't Stores v. Moitie,* 452 U. S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 108 (1981) ; *In re Energy Coop., supra,* 814 F . 2d at 1230 ; *see Velasquez, supra,* 123 N.J. at 505-06, 589 A.2d at 147, *Roberts v. Goldner,* 79 N.J. 82, 85, 397 A.2d 1090 (1979).

Id. at 412.

In addition, claim preclusion applies to both matters actually determined in the earlier action and to all other relevant matters that could have been so determined. *Id.* (citations omitted). The Petitioner, therefore, in seeking to redress a single wrong, was required to present all legal theories in his initial State action, or the same would be precluded in any subsequent action. *See id.* at 413.

Applying the *Watkins* test, the District Court correctly found that Petitioner was barred from attempting to relitigate his State court claims under the doctrine of *res judicata* or claim preclusion. (Ra8 to 10).

First, there is no doubt that the prior judgments in the companion New Jersey State court proceedings were valid, final and on the merits. Petitioner's claims arising from alleged constitutional and civil rights violations under 42 U.S.C. § 1983, 1985, and 1986, were raised, reviewed, and adjudicated in the State

court proceedings, addressed again on appeal by the Appellate Division, and the Supreme Court of New Jersey twice refused to grant certification to hear the issues.

Contrary to the protestation of Petitioner, it is well-settled that even a judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits, "as fully and completely as if the order had been entered after trial." *Velasquez v. Franz*, 123 N.J. 498, 507 (1991) (citing *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972) (citing *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *see also*, Fed. R. Civ. P. 41(b); N.J. Ct. R. 4:37-2(d). It is equally clear that a disposition by summary judgment constitutes an adjudication on the merits. *See Peduto v. City of North Wildwood*, 696 F. Supp. 1004, 1008 (D.N.J. 1988), *aff'd*, 878 F.2d 725 (3d Cir. 1989) (citing *Martucci v. Mayer*, 210 F.2d 259, 260-61 (3d Cir. 1954) (applying New Jersey law); *Anster v. Kinolan*, 153 N.J. Super. 52, 56 (App. Div. 1977); Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d, §§ 2712 (at 584) and 2735 (at 445). Moreover, "[u]nder the principles of *res judicata* claims that are actually litigated and determined before trial also are barred from being relitigated." *Id.* at 506.

Applying these principles, the first prong of the *Watkins* test has been satisfied as it is eminently clear that the judgments entered in the companion New Jersey State court lawsuits were valid, final and on the merits. The "subdivision" case was ultimately dismissed by the entry of summary judgment and the "ordinance" case was dismissed by the trial court af ter a three day trial . These dispositions on the merits were affirmed on appeal in all respects.

The second *Watkins* requirement for claim preclusion has also been satisfied because the parties in the earlier companion State actions were identical to or in privity with those in the present action. The third and final requirement of the *Watkins* test has also

been satisfied because the claims in this federal action arose out of the same transaction or occurrence ("subdivision" case and "ordinance" case) as the claims raised and adjudicated against Petitioner in the prior companion State court proceedings.

The Supreme Court of New Jersey has set forth the following considerations to be determined in applying the third *Watkins* requirement:

> To characterize two causes of action as the same for claim preclusion purposes, a court must analyze (1) whether the wrong for which redress is sought is the same in both actions (that is, whether the acts complained of and the demand for relief are the same), (2) whether the theory of recovery is the same, (3) whether the witnesses and documents necessary at trial are the same and (4) whether the material facts alleged are the same.

Pittman, 756 F. Supp. at 841 (citing *Culver v. Insurance Co. of America*, 115 N.J. 451, 460 (1989)); *see also, Wheeler v. Nieves*, 762 F. Supp. 617, 615 (D.N.J. 1991).

Applying these principles, the District Court properly concluded that the third and final requirement of the *Watkins* test had been satisfied:

> Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the [companion] state action[s]. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief

> previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action[s]. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim[s]. Accordingly, this claim is barred under the doctrine of *res judicata.*

(Ra10).

The apparent thrust of Petitioner's application to this Court lies in Petitioner's curious claim that he has not had his "day in court." (Pb8, footnote). Petitioner's argument is without merit because he was twice afforded a full and fair opportunity to litigate and did litigate his land use, constitutional, and civil rights claims in the State court proceedings. The State trial and appellate courts adjudicated and rejected Petitioner's claims, and the appellate court twice found no violation or infringement of Petitioner's constitutional or civil rights. The Supreme Court of New Jersey twice refused to grant certification and twice denied reconsideration.

Nonetheless, Petitioner sought to circumvent these adverse adjudications by combining his two State court complaints into the subject federal complaint (Pb32, admission of Petitioner) and by attempting to relitigate the same issues against the same parties in federal court. 42 U.S.C. § 1983, however, "does not allow relitigation of the same issues in federal court." *Peduto*, 878 F. 2d at 729 (quoting *Allen v. McCurry*, 449 U.S. 90, 101 (1980)). Due process does not require that Petitioner have the opportunity to relitigate previously adjudicated claims again in federal court. *Krison*, 767 F.2d at 349. Rather, due process only requires "the

opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The lower courts recognized that Petitioner did in fact litigate the companion State court actions in a meaningful manner at both the trial and appellate levels.

It is abundantly clear that Petitioner has had his "days in court" on the same issues (and against the same parties) involved in this matter. Petitioner is not entitled to yet another bite at the apple to relitigate his previously adjudicated claims in federal court, nor should the taxpayers of the Township of Chatham be compelled to fund the defense of his previously adjudicated, meritless claims.

Finally, to permit Petitioner to maintain this action in federal court would be inconsistent with the rationale underlying *res judicata or* claim preclusion. Fairness demands that this Court put a definite end to this burdensome litigation. *See Reed v. Allen*, 286 U.S. 191, 198-199 (1932). Petitioner's claims have been fully and finally adjudicated on the merits in State court and cannot be relitigated by the parties or their privies. *Id.* Accordingly, the lower courts properly dismissed Petitioner's federal complaint based upon the doctrine of *res judicata* or claim preclusion. (Ra7 to 10, 11).

II.

THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF COLLATERAL ESTOPPEL OR ISSUE PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDICATED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

" 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and

decided.' " *Wheeler v. Nieves*, 762 F. Supp. 617, 624 (D.N.J. 1991) (quoting *McNasby*, 888 F.2d at 275 n. 7 (citation omitted)) . This doctrine requires that later courts respect the first actual decision of a matter that has been actually heard and litigated previously. *Id.* In other words, a plaintiff should not be permitted to relitigate those issues that have been directly determined adversely to him in the State court proceedings. *Id.* at 615.

In order to apply issue preclusion in New Jersey, a court must conclude that:

> (1) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Elec. & Gas Co.*, 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board of Adjustment*, 202 N.J. Super. 312 (App . Div. 1985)). (Ra10) .

In applying these factors, the District Court properly concluded that each and every element had been satisfied to warrant the application of collateral estoppel or issue preclusion to the claims set forth in the federal complaint. First, the prior companion State court proceedings addressed and adjudicated Petitioner's land use, constitutional, and civil rights claims and found them to be without merit. The Appellate Division twice affirmed the trial court dispositions, and specifically reviewed and rejected Petitioner's claims involving constitutional or civil rights violations. The Supreme Court of New Jersey twice denied Petitioner's applications for certification and for reconsideration.

Second, there is no doubt that the judgments rendered in the prior State court companion cases were valid and final. Third, the State court proceedings specifically addressed and adversely adjudicated Petitioner's claims of constitutional and civil rights violations in reaching their respective judgments. Finally, the parties were identical in both the companion State court proceedings and in this federal action.

Accordingly, the lower courts properly dismissed the federal complaint under the doctrine of collateral estoppel or issue preclusion, because the Petitioner was foreclosed as a matter of law from relitigating in federal court the same previously raised and adversely adjudicated claims. (Ra10 to 11).

CONCLUSION

For the reasons presented herein, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel of Record
WALTER G. LUGER
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Attorneys for All Respondents
Except Charles Kurebanas
and Socrates Kyritsis

APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED APRIL 23, 1992

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 91-5446

ROBERT J. BURCH,

Plaintiff,

v.

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; and SOCRATES KYRITSIS,

Defendants.

OPINION

APPEARANCES:

ROBERT J. BURCH, *pro se*
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Appendix A

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BISSELL, *District Judge*

This matter arises on the basis of defendants' motions for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Defendants Socrates Kyritsis, Charles Kurebanas, and the former Chatham Township officials have each moved for dismissal. As the legal theories underlying the three motions are identical, this Court will consider them together.

Appendix A

Plaintiff *pro se*, Robert J. Burch, is a resident of Chatham Township. Burch filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986,[1] on December 18, 1991, alleging violations of his constitutional rights. In a prolix, eighteen-count complaint, plaintiff essentially avers that defendants conspired to deprive him of his constitutional property rights, through the discriminatory application of a municipal zoning requirement.

Named as defendants in the complaint are the Township of Chatham ("Township"); the Planning Board of Chatham Township (the "Board"); Jeffrey Taylor, former Mayor of Chatham Township; Robert Kirkpatrick, former Township Engineer; Marshall Bissell, member of the Planning Board; Richard Bradley, member and Chairman of the Planning Board; Donald Malehorn, attorney for the Planning Board; Otto Vopelius, Secretary of the Planning Board; Priscilla Beck, member of the Planning Board;

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1. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 provides a federal cause of action for persons deprived of rights or privileges under the law as the result of a conspiracy.

Section 1986 provides a federal cause of action against persons having knowledge of and ability to prevent a conspiracy who fail to do so.

Appendix A

Gayle Williams, member of the Planning Board; Socrates Kyritsis, the property owner seeking to develop a lot adjoining plaintiff's property in Chatham Township; and Charles Kurebanas, a former attorney for Mr. Kyritsis.

Ascertaining plaintiff's version of the facts requires arduous distillation of plaintiff's complaint. Prior to filing this action, the plaintiff filed two cases in the New Jersey Superior Court, Law Division, against the same defendants named here. Both cases were decided against plaintiff. In separate appeals, the Appellate Division affirmed the trial court's rulings. Subsequently, the New Jersey Supreme Court denied plaintiff's petitions for certification.

The first of these cases, Appellate Division Docket No. A-4122-89T2, was decided March 8, 1991. Plaintiff challenged the Chatham Township Planning Board's approval of defendant Kyritsis' subdivision application, which had been granted June 1, 1987. Kyritsis sought approval of a plan to construct a residential development (Sycamore Hill) on property adjoining plaintiff's lot.

On June 15, 1987, plaintiff brought suit, setting forth four counts. The first three involved the Board's failure to comply with municipal zoning ordinances. These claims were remanded to the Board for a hearing *de novo*, due to significant deficiencies in the record of the proceedings before the Board, and were eventually dismissed as moot. Plaintiff's fourth claim alleged a violation of the plaintiff's constitutional rights under 42 U.S.C.A. §§ 1983, 1985 and 1986.

The trial court dismissed the federal law claim on summary judgment. The Appellate Division affirmed, finding no discernable violation of plaintiff's civil rights.

In the action currently pending before this Court, plaintiff

asserts that the Superior Court rendered opinions without providing an adequate hearing for plaintiff's claims. In the brief opposing defendants' motion to dismiss, plaintiff attempts to clarify this position, advancing the theory that the Superior Court's summary dismissal of the constitutional violations claim was "based primarily upon defendants' assertion of an 'irredeemably deficient' record before the planning board." Plaintiff argues that due to the state courts' view that the record before the Board was deficient, those courts failed to render a decision on the merits of plaintiff's constitutional claims.

In the second lawsuit filed by the plaintiff, Appellate Division Docket No. A-2323-89T2, plaintiff challenged local Ordinance 2-88, which amended the existing zoning law, as unconstitutional spot zoning. The Ordinance rendered the existing town corner lot setback requirements inapplicable to any lot that became a corner lot as the result of the dedication of a new street right of way. Plaintiff owned a lot adjacent to a proposed right of way. Without the amendment of Ordinance 2-88 to the municipal zoning law, plaintiff's lot would have been rendered a non-conforming corner lot. Plaintiff alleged that this Ordinance arbitrarily deprived him of a property interest in the previously prevailing setback requirement.

The trial court conducted a plenary hearing on October 31, November 2 and November 8, 1989, and entered final judgment against plaintiff on November 24, 1989. The Appellate Division affirmed, nothing that "[t]here is no constitutionally protected property interest in the application of a zoning ordinance's setback requirement." Plaintiff appealed both Appellate Division decisions to the New Jersey Supreme Court, which denied plaintiff's petitions for certification on July 9, 1991.

Plaintiff continues to advance the theory that by amending the

municipal zoning ordinance, defendants' violated his constitutionally protected property interest and denied him equal protection of the laws. Additionally, plaintiff maintains that his claims of civil rights violations were not adjudicated on the merits in the state court proceedings. For convenient reference, the texts of both Appellate Division opinions are annexed hereto as Exhibits A and B.

DISCUSSION

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Florida*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985).

A complaint drafted by a *pro se* litigant must be liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520 (1971), and *pro se* submissions "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh'g denied*, 429 U.S. 1066 (1977) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1971), *reh'g denied*, 405 U.S. 948 (1972)): *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *on reh'g*, *Gillespie v. Crawford*, 833 F.2d 47, 49 (5th Cir. 1987), *on reh'g*, 853 F.2d 1101 (5th Cir. 1988) (*en banc*).

When reviewing a *pro se* complaint, a court must assume plaintiff's factual allegations to be true and construe his claim

liberally. *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989); *Roman v. Jeffes*, 904 F.2d 192, 197 (3d Cir. 1990). In deciding whether to dismiss a *pro se* complaint it must "appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Therefore, on a motion to dismiss a complaint drafted by a *pro se* litigant, the complaint must be given even more leeway than the very liberal standards for withstanding a motion to dismiss a complaint drafted by an attorney.

While thus obliged to construe a litigant's *pro se* complaint liberally, a court may not bend the law in his favor. The Full Faith and Credit Act, 28 U.S.C. § 1738, mandates that state court proceedings " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons*, 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). This standard has been applied in civil rights actions filed under 42 U.S.C. § 1983. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3d Cir. 1989) (citing *Miara v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 74 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980)). Additionally, under this statute, federal courts are to "refer to the preclusion law of the State in which judgment was rendered," *Marress*, 470 U.S. at 380, and are not to "employ their own rules of res judicata in determining the effect of state judgments." (*Id.*, quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982)). Utilizing these principles, New Jersey law must be examined in resolving the preclusion controversy presented here, that is, whether plaintiff's claims are precluded because of the foregoing judgments in state court.

The New Jersey Supreme Court has often employed the doctrine of *res judicata*, which generally provides that "[a] cause

of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigated by those parties . . . in a new proceeding." *Roberts v. Goldner,* 79 N.J. 82, 85 (1979) (citations omitted). The Court has refined and elucidated the elements of this doctrine, particularly in the recent decision *Watkins v. Resorts Intern. Hotel & Casino,* 124 N.J. 398 (1991). In *Watkins,* the Court noted that federal law and New Jersey law both require three basic elements:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

(*Id.* at 412 (citing *Federated Stores v. Moitie*, 452 U.S. 394, 398 (1981).

The *Watkins* Court also explained that *res judicata* or claim preclusion applies to all relevant matters that *could* have been determined in a prior action, not merely those matters actually decided. (*Id.*, citing *Angel v. Bullington,* 330 U.S. 183, 192-93 (1947); *Culver v. Insurance Co. of North America,* 115 N.J. 451 (1989)). A litigant seeking redress for a single wrong must present all legal theories in the initial action, or they will be precluded in any subsequent action. (*Id.* at 413) (citations omitted).

Applying the first prong of the *Watkins* multi-factored test to the case at bar, it is clear that the judgments entered in the New Jersey state courts were valid, final and on the merits. Plaintiff's civil rights claims were dismissed on summary judgment by the trial court, and this ruling was specifically addressed and affirmed

by the Appellate Division. This judgment meets the *Watkins* test, as "[a] judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.' " *Velasquez v. Franz*, 123 N.J. 498, 507 (1991) (citations omitted).

The second prong of this test is also met, as the parties in the instant case are identical to the parties in the antecedent state action.

The final prong under the *Watkins* claim preclusion analysis concerns whether the claim in the subsequent action emanates from the same incident that prompted the initial claim. Application of this prong is not simple, and requires a four-point analysis in which the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions) *Gissen v. Tackman*, 401 F. Supp. 310, 312 (D.N.J. 1975); (2) whether the theory of recovery is the same; (3) whether the witnesses and the documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first) *O'Shea v. Chrysler Corporation*, 206 F. Supp. 601, 605 (D.N.J. 1962); and (4) whether the *material* facts alleged are the same. *United States v. Athlone Industries Inc.*, 746 F. Supp. 977, 984 (3d Cir. 1984).

Culver v. Insurance Co. of North America, 115 N.J. 451, 461-62 (12989) (emphasis in original).

Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the state action. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim. Accordingly, this claim is barred under the doctrine of *res judicata*.

Plaintiff's claim is also barred under the doctrine of issue preclusion or collateral estoppel. " 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.' " *Wheeler v. Nieves*, 762 F. Supp. 617, 624 (D.N.J. 1991) (citations omitted). A plaintiff will not be permitted to relitigate issues that have been directly addressed in prior proceedings. (*Id.* at 615).

Issue preclusion is warranted if a court concludes that

> (1) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Electric & Gas Co.*, 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board*

of Adjustment, 202 N.J. Super. 312 (App. Div. 1985)).

These criteria are all satisfied in the case at bar. The state court addressed plaintiff's assertions of civil rights allegations, and found them to be meritless. The court did not, as plaintiff maintains, fail to adjudicate these allegations due to a deficient record before the planning board. Rather, the court granted summary judgment, and declared that plaintiff failed to present evidence sufficient to support a finding that the alleged civil rights violations actually occurred.

Furthermore, it is evident that the state court's judgments were final and valid. The civil rights claims were addressed at both the trial and appellate levels, and found to be meritless. These claims were essential to the plaintiff's state action, and the parties in this action are the same as those in the state action. Consequently, plaintiff's claim is barred under the doctrine of collateral estoppel.

It is indisputable from the facts set forth in plaintiff's complaint, and from the record in the state proceedings, that the claims advanced by the plaintiff have already been adjudicated in state court. Specifically, plaintiff's allegations of civil rights violations were directly addressed by both the trial court and the appellate court, and found to be without merit. As a result, plaintiff's claims are barred from consideration in this court under the parallel doctrines of *res judicata* and collateral estoppel.[2]

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2. Plaintiff asserts that jurisdiction in this court, as to all counts, is based upon 42 U.S.C. § 1983. (Compl., ¶ 1 and *passim*). Some counts as phrased appear to plead claims cognizable (it [sic] at all) only under state law. Because they either were or could have been raised in the prior Superior Court suits, plaintiff is barred from raising them belatedly in the present action. Alternatively, such state claims are subject to dismissal for lack of pendent jurisdiction due to the dismissal of all federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Appendix A

Defendants' motion to dismiss is accompanied by a request to enjoin plaintiff from further pursing this litigation, and to impose sanctions to penalize plaintiff for "needlessly wasting judicial resources and the taxpayer's money." Therefore, this Court must analyze plaintiff's complaint to determine whether Rule 11 sanctions are warranted.[3]

"Rule 11 sanctions may be imposed 'in the exceptional circumstance' where the claim or motion is patently unmeritorious or frivolous." *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (citing *Giardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); *see also Dura Systems. Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 556 (3d Cir. 198); *Mary Ann Pensiero Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988)). The requirement that an attorney engage in a reasonable inquiry as to both the facts and the law was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." (Fed. R. Civ. P. 11 (advisory committee notes); *see also Dura Systems*, 886 F.2d at 556).

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3. Fed. R. Civ. P. 11 provides, in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

Appendix A

Rule 11 sanctions are proper only in situations involving a signed pleading or other paper. *Schering Corp. v. Vitarine Pharmaceutical. Inc.*, 889 F.2d 490, 496 (3d Cir. 1989) (citations omitted). In addition, the proper focus is on the circumstances that existed at the time counsel filed the challenged paper. (*Id.*) "The wisdom of hindsight is to be avoided; the attorney's conduct must be judged by what was reasonable to believe at the time the pleading, motion, or other paper was submitted." (*Id.*)

The Third Circuit has also cautioned that "[l]itigants misuse the Rule when sanctions are brought against a party whose only sin was being on the unsuccessful side of a ruling or judgment." *Giardo*, 835 F.2d at 483; *see also Dura Systems*, 886 F.2d at 556; *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986) (district court may not impose sanctions simply because party's nonfrivolous argument is found by the district court to be unjustified). Furthermore, the fact that an argument is self-serving does not make it rise to the level of becoming "patently unmeritorious or frivolous." *See Dura Systems*, 886 F.2d at 557.

The United States Supreme Court recently considered the scope of a court's jurisdiction to impose sanctions even after a plaintiff voluntarily dismisses a complaint. The Court stated that

> the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. See Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 [USCS Court Rules, Fed. Rules of Civ. Proc., Notes following Rule 11]. Rule 11

> imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and "not interposed for any improper purpose."

Cooter & Geil v. Hartmarx Corp., __ U.S. __, 110 L. Ed. 2d 359, 375 (1990).

Applying these principles to the case at bar, it does not currently appear that the imposition of sanctions or the issuance of an injunction against further litigation are warranted. Although sanctions may be imposed on *pro se* litigants, *see Calesnick v. Redevelopment Auth. of Philadelphia,* 696 F. Supp. 1053, 1056 (E.D. Pa. 1988), plaintiff Robert Burch has not yet demonstrated the obstinacy in pursuing his failed claim that the *Calesnick* plaintiff displayed. Burch's complaint and responsive pleadings indicate that his actual belief, though erroneous, was that the state court never properly addressed his civil rights claim. Thus, although the complaint is clearly barred under the doctrines of *res judicata* and collateral estoppel, it is not so patently unmeritorious as to justify the imposition of sanctions.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 23 , 1992

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-4122-89T2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4122-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS,

Defendants-Respondents.

Argued February 20, 1991 — Decided March 8, 1991

Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

Robert J. Burch argued *pro se*.

Appendix B

Daniel S. Bernstein argued the cause for respondents Planning Board of Chatham Township; Township of Chatham; Jeffrey Taylor; Robert Kirkpatrick; Marshall Bissell; Richard Bradley; Priscilla Beck; Otto Vopelius; Gayle Williams and Donald Malehorn (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

John C. Kennedy argued the cause for respondent Kurebanas (O'Donnell, Kennedy, Vesple & Piechta, attorneys; Mr. Kennedy, of counsel and on the brief).

Edward F. Broderick, Jr., argued the cause for respondent Kyritsis (Broderick, Newmark & Grather, attorneys; Mr. Broderick and Louis Mondello, on the brief).

PER CURIAM

This appeal is companion to that considered under Docket No. A-2323-89T2. The statement of background factual material set forth in our decision on that appeal filed contemporaneously herewith is incorporated herein and made a part hereof by reference.

In January 1986, defendant Socrates Kyritsis applied for subdivision approval of Lot 42, a 9.41 acre parcel located on Block 38 on the municipal tax map. The parcel is located between Meyersville Road and Fairmount Avenue, behind plaintiff's property, Lot 41, in Chatham Township. The purpose of his

application was to construct a residential development to be known as "Sycamore Hill." The Chatham Township Planning Board held public meetings on the application on May 5, 19, September 15, October 20, November 17 and December 15, 1986, March 2, June 1 and 15, 1987. On June 1, 1987, the Board granted preliminary major subdivision approval, memorialized by written resolution dated June 15, 1987.

On June 15, 1987, plaintiff brought this suit in lieu of prerogative writ. His amended complaint, filed October 22, 1987, was framed in four counts. The first three counts challenged the Board's preliminary approval for failure to conform with municipal ordinances. The fourth count sought monetary damages from all defendants on the claim that they had violated plaintiff's constitutional rights, contrary to 42 *U.S.C.A.* §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, and each individual member of the Planning Board who voted in favor of the subdivision.

Recognizing that significant deficiencies existed in the record of the proceedings before the Planning Board, the matter was remanded at defendants' request to the board for a hearing *de novo* and the first three counts of the amended complaint were dismissed as moot. The fourth count was dismissed on summary judgment for failure of plaintiff to demonstrate any genuine issue of material fact to support his claim that his constitutional rights had been violated. Plaintiff now appeals from that determination.

The basis of plaintiff's civil rights action lies in the fact that the subdivision approval was granted over plaintiff's objections. Plaintiff asserts that the approval came about as the result of a

conspiracy among the defendants whereby Kyritsis would pay the Township $125,000. The facts underlying the alleged conspiracy can be briefly stated. The original subdivision plans envisioned the installation of detention basins to accommodate drainage flow from the steep slopes at the far end of the tract along Fairmount Avenue where Sycamore Hill would have approximately 400 feet of frontage. The anticipated cost of the basins was approximately $125,000. After the plans had been submitted and reviewed it was discovered that the Township was considering the reconstruction of Fairmount Avenue and the installation of drainage improvements for the benefit of the entire area. As we understand it from the record, the Township determined to substitute a larger diameter pipe with increased flow rates so that it would accommodate not only the area as it then existed, but with the new development in place as well. The anticipated cost of the substitution to the township was to be approximately $10,000. However, since Kyritsis would then be able to tie into the municipal system, thereby saving approximately $125,000, he agreed to pay that sum to the municipality. We find nothing in the record to support a different version of that transaction.

We discern no infringement of plaintiff's civil rights or any damage to plaintiff resulting from defendants' conduct. His property has not been diminished in value and the fact that the changed landscape will be less to his liking is not a redressible injury.

We note in particular that under our decision in *Anastasio v. Planning Bd. of Tp. of West Orange*, 209 *N.J. Super.* 499 (App. Div.), *certif. denied*, 107 *N.J.* 46 (1986), defendants who are being sued in their individual capacities as members of the Planning Board are absolutely immune from liability in actions brought under 42 *U.S.C.A.* § 1983.

Appendix B

It has long been recognized that the summary judgment procedure

> is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

Judson v. Peoples Bank & Trust Co. of Westfield, 17 *N.J.* 67, 74 (1954). As the Supreme Court noted in *Robbins v. Jersey City*, 23 *N.J.* 229, 241 (1957), the summary judgment procedure affords protection "against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention."

The summary judgment dated February 26, 1988, is affirmed substantially for the reasons stated by Judge Stanton for the Law Division in his oral opinion of the same date.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-2323-89T2

NOT FOR PUBLICATION WITHOUT THE APROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2323-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE TOWNSHIP OF CHATHAM

Defendant-Respondent.

Argued February 20, 1991 - Decided Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

John Anthony Lombardi argued the case for appellant (Robert J. Burch, *pro se*, on the brief).

Daniel S. Bernstein argued the cause for respondent (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

Appendix C

PER CURIAM

This appeal is companion to that considered under Docket No. A-4122-89T2.

Plaintiff is the owner of Lot 41 on Block 38 in the Township of Chatham. The lot has a frontage on Meyersville Road of 108 feet and a depth of 300 feet. To the south, immediately behind plaintiff's lot, is Lot 42, the subject of a development application by Socrates Kyritsis. A 57.7-foot wide extension (the "staff") of Lot 42 runs out from behind plaintiff's lot along its easterly side for approximately 270 feet to Meyersville Road. As part of the development project, Kyritsis proposed to install within the staff a 50-foot wide roadway to be known as Sycamore Drive, which would provide access to the interior development from Meyersville Road. The effect of this would be to transform plaintiff's lot into a corner lot. The Chatham ordinance requires that structures on corner lots conform with front yard setback requirements with respect to both abutting streets so that corner lot structures will be in line with all other structures on both streets. Although plaintiff's house now meets township sideyard requirements for non-corner lots, the installation of Sycamore Drive would convert it into a nonconforming structure. Its actual setback on the new street would be only around 34.89 feet and would fail to satisfy the 50-foot front yard/side yard setback requirements for corner lots.

Efforts were made by Kyritsis to meet plaintiff's objections to the change of his lot into a nonconforming use. Since only 50 feet of the 57.7-foot wide staff were required for the Sycamore Drive right-of-way, one solution proposed was to convey the excess 7.7 feet to plaintiff, thereby increasing his setback on Sycamore Drive to 42.59 feet. Another possible solution was to subdivide the 7.7-

foot wide strip into a separate lot which would lie between plaintiff's lot and Sycamore Drive. Although such a lot would be unusable, it would avoid making plaintiff's lot into a corner lot subject to 50-foot setback requirements on both abutting streets.

Neither proposal was acceptable and the situation was ultimately resolved by the Township through the enactment of Ordinance 2-88. The import thereof is that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land. This exception to the setback requirements is contingent upon the dedication occurring after the erection of a principal structure on the lot. The effect of this, obviously, is to save plaintiff's lot from nonconformity.

Plaintiff brought this action in lieu of prerogative writ to invalidate Ordinance 2-88. He challenges the ordinance as being "arbitrary, unreasonable and capricious, and as discriminatory spot zoning which takes private property without due process. . . ." Plaintiff insists that his right to the requirement of a side yard setback from Sycamore Drive of the same distance as all other corner lots in the community is inviolate, and that Kyritsis be required to install Sycamore Drive so as not to infringe upon plaintiff's claimed property interest in the prevailing setback requirement.

After a plenary hearing conducted on October 31, November 2 and November 8, 1989, a final judgment was entered November 24, 1989, in favor of defendant and against plaintiff. Plaintiff appeals.

We find no merit to the premise of plaintiff's suit. There is no

constitutionally protected property interest in the application of a zoning ordinance's setback requirement. In our view, the Township's determination to render corner lot setback requirements inapplicable to lots anywhere in the municipality which become corner lots under the circumstances here presented is a legitimate exercise of legislative power not subject to judicial superintendence.

We affirm substantially for the reasons stated by Judge Stanton in his oral opinion for the Law Division dated November 9, 1989.

Supreme Court, U.S
FILED
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OFFICE OF THE CLERK

No. 92-1585

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BURCH,

Petitioner,

-v-

THE TOWNSHIP OF CHATHAM, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

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RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether the case was properly dismissed on the basis of *res judicata* or claim preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

2. Whether the case was properly dismissed on the basis of collateral estoppel or issue preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

LIST OF PARTIES

The parties in this matter and in the proceedings below are the same and include Robert J. Burch, Petitioner-Plaintiff, and Respondent- Defendants, The Township of Chatham, The Planning Board of Chatham Township, Jeffrey Taylor, Robert Kirkpatrick, Marshall Bissell (deceased), Richard Bradley, Priscilla Beck, Otto Vopelius, Gayle Williams, Donald Malehorn, Charles Kurebanas, and Socrates Kyritisis.

LIST OF COMPANIES PURSUANT TO RULE 29.1

Respondent, The Township of Chatham, is a municipal corporation of the State of New Jersey and neither it nor Respondent, The Planning Board of Chatham Township, has any parent company, subsidiary or affiliate.

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No. 92-1585

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BURCH,

Petitioner,

vs.

THE TOWNSHIP OF CHATHAM, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

OPINIONS BELOW

By written opinion dated April 23, 1992, the United States District Court for the District of New Jersey dismissed Plaintiff-Petitioner's federal complaint on the basis that the claims set forth therein were barred by *res judicata* or claim preclusion and by

collateral estoppel or issue preclusion. The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court on December 31, 1992. Plaintiff-Petitioner ("Petitioner") seeks review of the Third Circuit's Judgment Order which affirmed the unpublished, written decision of the District Court. [1]

COUNTERSTATEMENT OF THE CASE

Petitioner Robert J. Burch is a resident of the Township of Chatham, New Jersey. On December 15, 1991, Petitioner filed a prolix and somewhat incomprehensible eighteen count (sixty-six page) complaint in the District Court for the District of New Jersey alleging various land use violations and the violation of constitutional and civil rights under 42 U.S.C. §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, as well as certain individual Planning Board members.

To the extent comprehensible, the allegations set forth in the federal complaint had been previously pleaded, litigated, and adversely adjudicated against Petitioner in both the trial and appellate courts of the Superior Court of New Jersey in two prior companion cases. The Supreme Court of New Jersey declined to

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1. The District Court's unpublished, written opinion is reproduced in full in Appendix A to this Brief (at Ra1 to 14). The prior unpublished, written opinions of the Superior Court of New Jersey which are both dated March 8, 1991 and which are annexed to the District Court's written opinion are reproduced in full in this Brief as Exhibits B (Ra15 to 19) and C (Ra20 to 23), respectively. The District Court's Order dismissing Petitioner's Complaint is reproduced in Petitioner's Appendix (at Pa3 to 4) and the Judgment Order of the Third Circuit is reproduced in Petitioner's Appendix (at Pa1 to 2). As used herein, "Pb" refers to Petitioner's Brief, "Pa" refers to Petitioner's Appendix, and "Ra" refers to Respondents' Appendix.

grant certification in the companion cases, and denied Petitioner's applications for reconsideration.

Despite taking full advantage of the State judicial process and exhausting his appeals therein, Petitioner combined the adversely adjudicated allegations of both of his State court claims into his federal complaint, referenced the previously adjudicated State court proceedings in his federal complaint, and attempted to relitigate the same claims against the same parties in federal court. The District Court dismissed Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion. (Ra7 to 11). The Third Circuit affirmed the decision of the District Court and entered a Judgment Order. (Pa1 to 2).

The pertinent facts involving this matter and the underlying companion cases were addressed by the District Court and are summarized herein. (Ra2 to 6). On or about June 1, 1987, over Petitioner's objections, the Chatham Township Planning Board granted preliminary approval to the subdivision application filed by Respondent, Socrates Kyritsis. The preliminary approval authorized Kyritsis to construct a proposed residential development (Sycamore Hill) on property adjacent to Petitioner's residential property.

On or about June 15, 1987, Petitioner filed the first of two State court actions against the Respondents, captioned *Burch v. The Planning Board of Chatham Township, et al.*, (Docket No. L-9992-87) (the "subdivision case"). The first three counts of the four count complaint alleged that the Chatham Township Planning Board and its members had violated applicable land use laws and municipal ordinances in approving the development application. The fourth count of the complaint alleged that Petitioner's constitutional and civil rights under 42 U.S.C. § 1983 had been violated by the Respondents.

The trial court dismissed counts one through three of the complaint and remanded the entire development application to the Planning Board due to a defective record.[2] The trial court dismissed the fourth count of the complaint against the individual Planning Board members and representatives because they were immune from Petitioner's 1983 claims as a matter of controlling New Jersey law. The trial court found no violation of Petitioner's constitutional or civil rights by the Township or its Planning Board and entered summary judgment dismissing the remainder of the fourth count.

Despite Petitioner's partial victory in "overturning" the subdivision approval, Petitioner appealed the case. After oral argument, the Appellate Division of the Superior Court of New Jersey issued an unpublished, written opinion wherein the court affirmed the trial court's disposition of the "subdivision" case in all respects. (Ra15 to 19). The Appellate Division specifically reviewed and rejected Petitioner's allegations regarding any violation of his constitutional or civil rights.

The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

On April 4, 1988 Petitioner filed his second State lawsuit captioned *Burch v. The Township of Chatham,* (Docket No . MRS-L-1194-88) (the "ordinance case"). Therein, Petitioner challenged

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2. The record (*i. e.*, tapes) from two Planning Board meetings wherein the Kyritis development application was discussed could not be found and was either lost or destroyed, and certain Planning Board members who had voted on the application were unable to certify that they had reviewed the tapes of the Planning Board meetings from which they were absent, thereby violating the requirements of the New Jersey Municipal Land Use Law. N.J.S.A. 40:55D-1 *et seq.*

the validity of an amendment to Chatham Township Land Use Ordinance 2-88, on state law grounds, as well as upon the ground of alleged infringement of Petitioner's constitutional and civil rights. The import of amended zoning ordinance 2-88 was ". . . that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land." (Ra22). The effect of Ordinance 2-88 was to save Petitioner's lot (and similarly situated lots) from non-conformity with applicable zoning regulations.[3]

After a three-day trial, the trial court sustained the validity of the amended zoning ordinance, and concluded that Petitioner's constitutional and civil rights had not been violated. Petitioner again filed an appeal.

After oral argument, the "ordinance" case was sustained on appeal in all respects by the Appellate Division of the Superior Court of New Jersey. (Ra20 to 23). The Appellate Division specifically reviewed and rejected Petitioner's allegation that his constitutional and civil rights had been violated. The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

Despite the fact that Petitioner's companion State court lawsuits had been adversely adjudicated on the merits at both the trial and appellate levels, Petitioner combined the allegations of both of his State court complaints into the subject federal

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3. The proposed access street to the Kyritsis subdivision was to have been constructed along the easterly boundary of Petitioner's lot and would have converted Petitioner's interior lot into a corner lot. If same was constructed, Petitioner's lot would have fronted on two streets. Ordinance 2-88 prevented Petitioner's lot (and similarly situated lots) from becoming nonconforming with the municipal land use requirements of Chatham Township.

complaint (Pb32, admission of Petitioner), and attempted to circumvent the unfavorable State court adjudications and to relitigate the same issues against the same parties in federal court. The following table provides a shorthand analysis of Petitioner's federal complaint (eighteen counts), as well as the corresponding prior State court complaints (and counts), and the respective State court appellate decisions wherein the same or similar issues were considered and adversely adjudicated against Petitioner.[4]

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4. This table was submitted to the District Court and to the Third Circuit. No objection was made by Petitioner. The table has been modified to reflect the disposition of the companion cases made by the State appellate courts.

FEDERAL COMPLAINT COUNT	DESCRIPTION OF SUBJECT MATTER OF FEDERAL COMPLAINT COUNTS	SUBDIV. SUIT COUNT	ORD. SUIT COUNT	SUBDIV. DECIS.- PAGE	ORD. DECIS.- PAGE
I	Invokes this Court's jurisdiction by alleging violations of Plaintiff's constitutional rights pursuant to 42 U.S.C. § 1983.	1,2,4	3,5	2,4 (Ra16 to 19)	3 (Ra22 to 23)
II	Seeks relitigation of land use issues previously raised, as well as allegation of constitutionally protected property right in the application of a zoning ordinance's setback requirement.	2,4	3,4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
III	Seeks relitigation of zoning issues previously raised.	3,4,5	1,2,3 4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
IV	Seeks relitigation of Plaintiff's objections to Chatham Township's enactment of Ordinance 2-88.	1	3,5	4 (Ra18 to 19)	3,4 (Ra22 to 23)

V	Seeks relitigation of issues raised in both the "subdivision" case, and the "ordinance" case.	4	1,2,3 4,5	3-4 (Ra17 to 19)	3 (Ra22 to 23)	
VI	Seeks to overrule and relitigate the land use and zoning determinations made by the state courts.		2,3,4		3 (Ra22 to 23)	
VII	Seeks to relitigate Plaintiff's claim regarding zoning ordinance 2-88, and the related land use issues.	4	5	4 (Ra18 to 19)	3 (Ra22 to 23)	∞
VIII	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other alleged conduct of defendants.	4	5	3-4 (Ra17 to 19)		

IX	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township in return for alleged favorable treatment.	4	5	3-4 (Ra17 to 19)	
X	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other land use issues.	4	5	3-4 (Ra17 to 19)	
XI	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	1	1	3-4 (Ra17 to 19)	3 (Ra22 to 23)

XII	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	3,4	2	3-4 (Ra17 to 19)	
XIII	Alleges that Planning Board attorney Malehorn conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	3-4 (Ra22 to 23)
XIV	Alleges that Township Engineer Kirkpatrick conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	

XV	Alleges covert meetings and conspiracy between the municipal and private defendants.	4		3-4 (Ra17 to 19)	
XVI	Alleges defendants Kyritsis and Kurebanas participated in alleged conspiracy and acceded to Township demands for $125,000 cash payment.	4		3-4 (Ra17 to 19)	
XVII	Alleges suggestions of Morris County Planning Board about sub-division went unheeded by defendants.		5		3-4 (Ra22 to 23)
XVIII	Alleges Plaintiff denied due process at Planning Board, trial and appellate levels by the actions of defendants.	1,2,3,4	1,2,3, 4,5	3-4 (Ra17 to 19)	3-4 (Ra22 to 23)

In all respects, the allegations set forth in Petitioner's sixty-six page federal complaint had been pleaded, raised, and adversely adjudicated against Petitioner in the prior companion State court proceedings. On April 13, 1992, after review of the briefs submitted by all parties and oral argument, the District Court dismissed Petitioner's federal complaint on the ground of *res judicata* or claim preclusion and on the ground of collateral estoppel or issue preclusion. (Ra6 to 11). The Third Circuit affirmed the unpublished, written opinion of the District Court by Judgment Order dated December 31, 1992. (Pa1 to 2).[5]

SUMMARY OF RESPONDENTS' OPPOSITION TO BURCH'S PETITION FOR CERTIORARI

Petitioner has not presented this Court with any substantial issue meriting review. The District Court's dismissal of Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion was affirmed without opinion by the Third Circuit on the basis of the dispositive, written opinion of the District Court. The District Court's decision is in all respects an unremarkable decision, it does not conflict on any point of law with the decision of any other court, and it does not in any other way call for the exercise of this Court's supervisory powers. Rather, Petitioner merely seeks to have this Court review the District Court's factual and legal findings, in which the Third Circuit concurred, and reverse its decision on this ground alone. Because the record is clear that the courts below did not commit any error, let alone a "very obvious and exceptional show[ing] of error," intervention by this Court is

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5. To date, the Sycamore Hill subdivision has not been constructed. Another sudivision application to the Chatham Township Planning Board would apparently be required to permit Respondent, Socrates Kyritsis, to develop or construct a subdivision. Petitioner, of course, would be permitted to object to any development application or approvals sought by Respondent, Socrates Kyritsis.

neither necessary nor appropriate. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see also, Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS BELOW PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF *RES JUDICATA* OR CLAIM PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDGED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

The District Court properly dismissed Petitioner's federal complaint on the basis of *res judicata* or claim preclusion. (Ra7 to 10). Even though sensitive to the fact that the Petitioner was a *pro se* litigant, the District Court recognized beyond doubt that the Petitioner was attempting to relitigate the same causes of action (against the same parties) which had been previously litigated and adversely adjudicated in two companion cases in the State courts of New Jersey. Indeed, the Petitioner has admitted that his federal complaint is a "consolidation" of his prior state court complaints. (Pb32).

The District Court recognized beyond doubt that Petitioner could demonstrate no legal theory which had not been previously raised and adjudicated in the State court proceedings. (Ra6 to 10); Fed. R. Civ. P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nonetheless, after having twice taken full advantage of the State judicial process and exhausting his appeals therein, the Petitioner continues his attempt to circumvent unfavorable final judgments on the merits in the State court proceedings by attempting to relitigate the same claims against the same parties in federal court.

Pursuant to the full faith and credit statute, proceedings within state court " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons,* 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). Thus, a federal court should generally " 'give the same preclusive effect to a state court judgment as another court of that state would give.' " *Peduto v. City of North Wildwood,* 878 F.2d 725, 728 (3d Cir. 1989) (quoting *Parsons Steel, Inc. v. First Alabama Bank,* 474 U. S. 518, 523 (1986)). It is equally clear that civil rights actions, instituted pursuant to 42 U.S.C. § 1983, are bound by this rule. *Id.* (citing *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75 (1984) ; *Allen v. McCurry,* 449 U. S. 90 (1980)); *Krison v. Nehls,* 767 F.2d 344, 347-48 (7th Cir. 1985).

Moreover, the full faith and credit statute mandates that the federal court employ the preclusion law of the jurisdiction in which judgment was rendered. *Marrese,* 470 U.S. at 380; *McNasby v. Crown Cork & Seal Co.,* 888 F.2d 270, 271 (3d Cir. 1989), *cert. denied,* 494 U.S. 1066 (1990); *Pittman v. LaFontaine,* 756 F. Supp. 834, 841 (D.N.J. 1991); 1B J. Moore, *Moore's Federal Practice* ¶ 0.406[1], at 272 (2d ed. 1992). The District Court, therefore, properly employed and applied New Jersey law in reaching the conclusion that Petitioner's claims were barred by *res judicata* or claim preclusion. (Ra7).

The Supreme Court of New Jersey recently reviewed the doctrine of *res judicata* in *Watkins v. Resorts Intern. Hotel & Casino,* 124 N.J. 398 (1991). Speaking in terms of claim preclusion[6], and noting that federal law and New Jersey law were

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6. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Pittman v. LaFontaine,* 756 F. Supp. 834, 841 (D.N.J. 1991) (quoting *McNasby Crown Cork & Seal Co.,* 888 F.2d 270, 275 (3d Cir. 1989) *cert. denied,* 494 U. S. 1066 (1990)).

the same, the court set forth the three basic elements required in New Jersey for claim preclusion or *res judicata*:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. *Federated Dep't Stores v. Moitie,* 452 U. S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 108 (1981) ; *In re Energy Coop., supra,* 814 F . 2d at 1230 ; *see Velasquez, supra,* 123 N.J. at 505-06, 589 A.2d at 147, *Roberts v. Goldner,* 79 N.J. 82, 85, 397 A.2d 1090 (1979).

Id. at 412.

In addition, claim preclusion applies to both matters actually determined in the earlier action and to all other relevant matters that could have been so determined. *Id.* (citations omitted). The Petitioner, therefore, in seeking to redress a single wrong, was required to present all legal theories in his initial State action, or the same would be precluded in any subsequent action. *See id.* at 413.

Applying the *Watkins* test, the District Court correctly found that Petitioner was barred from attempting to relitigate his State court claims under the doctrine of *res judicata* or claim preclusion. (Ra8 to 10).

First, there is no doubt that the prior judgments in the companion New Jersey State court proceedings were valid, final and on the merits. Petitioner's claims arising from alleged constitutional and civil rights violations under 42 U.S.C. § 1983, 1985, and 1986, were raised, reviewed, and adjudicated in the State

court proceedings, addressed again on appeal by the Appellate Division, and the Supreme Court of New Jersey twice refused to grant certification to hear the issues.

Contrary to the protestation of Petitioner, it is well-settled that even a judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits, "as fully and completely as if the order had been entered after trial." *Velasquez v. Franz,* 123 N.J. 498, 507 (1991) (citing *Gambocz v. Yelencsics,* 468 F.2d 837 (3d Cir. 1972) (citing *Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 327 (1955); *see also,* Fed. R. Civ. P. 41(b); N.J. Ct. R. 4:37-2(d). It is equally clear that a disposition by summary judgment constitutes an adjudication on the merits. *See Peduto v. City of North Wildwood,* 696 F. Supp. 1004, 1008 (D.N.J. 1988), *aff'd,* 878 F.2d 725 (3d Cir. 1989) (citing *Martucci v. Mayer,* 210 F.2d 259, 260-61 (3d Cir. 1954) (applying New Jersey law); *Anster v. Kinolan,* 153 N.J. Super. 52, 56 (App. Div. 1977); Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d, §§ 2712 (at 584) and 2735 (at 445). Moreover, "[u]nder the principles of *res judicata* claims that are actually litigated and determined before trial also are barred from being relitigated." *Id.* at 506.

Applying these principles, the first prong of the *Watkins* test has been satisfied as it is eminently clear that the judgments entered in the companion New Jersey State court lawsuits were valid, final and on the merits. The "subdivision" case was ultimately dismissed by the entry of summary judgment and the "ordinance" case was dismissed by the trial court af ter a three day trial . These dispositions on the merits were affirmed on appeal in all respects.

The second *Watkins* requirement for claim preclusion has also been satisfied because the parties in the earlier companion State actions were identical to or in privity with those in the present action. The third and final requirement of the *Watkins* test has also

been satisfied because the claims in this federal action arose out of the same transaction or occurrence ("subdivision" case and "ordinance" case) as the claims raised and adjudicated against Petitioner in the prior companion State court proceedings.

The Supreme Court of New Jersey has set forth the following considerations to be determined in applying the third *Watkins* requirement:

> To characterize two causes of action as the same for claim preclusion purposes, a court must analyze (1) whether the wrong for which redress is sought is the same in both actions (that is, whether the acts complained of and the demand for relief are the same), (2) whether the theory of recovery is the same, (3) whether the witnesses and documents necessary at trial are the same and (4) whether the material facts alleged are the same.

Pittman, 756 F. Supp. at 841 (citing *Culver v. Insurance Co. of America*, 115 N.J. 451, 460 (1989)); *see also, Wheeler v. Nieves*, 762 F. Supp. 617, 615 (D.N.J. 1991).

Applying these principles, the District Court properly concluded that the third and final requirement of the *Watkins* test had been satisfied:

> Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the [companion] state action[s]. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief

> previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action[s]. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim[s]. Accordingly, this claim is barred under the doctrine of *res judicata.*

(Ra10).

The apparent thrust of Petitioner's application to this Court lies in Petitioner's curious claim that he has not had his "day in court." (Pb8, footnote). Petitioner's argument is without merit because he was twice afforded a full and fair opportunity to litigate and did litigate his land use, constitutional, and civil rights claims in the State court proceedings. The State trial and appellate courts adjudicated and rejected Petitioner's claims, and the appellate court twice found no violation or infringement of Petitioner's constitutional or civil rights. The Supreme Court of New Jersey twice refused to grant certification and twice denied reconsideration.

Nonetheless, Petitioner sought to circumvent these adverse adjudications by combining his two State court complaints into the subject federal complaint (Pb32, admission of Petitioner) and by attempting to relitigate the same issues against the same parties in federal court. 42 U.S.C. § 1983, however, "does not allow relitigation of the same issues in federal court." *Peduto*, 878 F. 2d at 729 (quoting *Allen v. McCurry*, 449 U.S. 90, 101 (1980)). Due process does not require that Petitioner have the opportunity to relitigate previously adjudicated claims again in federal court. *Krison*, 767 F.2d at 349. Rather, due process only requires "the

opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The lower courts recognized that Petitioner did in fact litigate the companion State court actions in a meaningful manner at both the trial and appellate levels.

It is abundantly clear that Petitioner has had his "days in court" on the same issues (and against the same parties) involved in this matter. Petitioner is not entitled to yet another bite at the apple to relitigate his previously adjudicated claims in federal court, nor should the taxpayers of the Township of Chatham be compelled to fund the defense of his previously adjudicated, meritless claims.

Finally, to permit Petitioner to maintain this action in federal court would be inconsistent with the rationale underlying *res judicata* or claim preclusion. Fairness demands that this Court put a definite end to this burdensome litigation. *See Reed v. Allen*, 286 U.S. 191, 198-199 (1932). Petitioner's claims have been fully and finally adjudicated on the merits in State court and cannot be relitigated by the parties or their privies. *Id.* Accordingly, the lower courts properly dismissed Petitioner's federal complaint based upon the doctrine of *res judicata* or claim preclusion. (Ra7 to 10, 11).

II.

THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF COLLATERAL ESTOPPEL OR ISSUE PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDICATED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

" 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and

decided.' " *Wheeler v. Nieves*, 762 F. Supp. 617, 624 (D.N.J. 1991) (quoting *McNasby*, 888 F.2d at 275 n. 7 (citation omitted)) . This doctrine requires that later courts respect the first actual decision of a matter that has been actually heard and litigated previously. *Id.* In other words, a plaintiff should not be permitted to relitigate those issues that have been directly determined adversely to him in the State court proceedings. *Id.* at 615.

In order to apply issue preclusion in New Jersey, a court must conclude that:

> (1) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Elec. & Gas Co.*, 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board of Adjustment*, 202 N.J. Super. 312 (App . Div. 1985)). (Ra10) .

In applying these factors, the District Court properly concluded that each and every element had been satisfied to warrant the application of collateral estoppel or issue preclusion to the claims set forth in the federal complaint. First, the prior companion State court proceedings addressed and adjudicated Petitioner's land use, constitutional, and civil rights claims and found them to be without merit. The Appellate Division twice affirmed the trial court dispositions, and specifically reviewed and rejected Petitioner's claims involving constitutional or civil rights violations. The Supreme Court of New Jersey twice denied Petitioner's applications for certification and for reconsideration.

Second, there is no doubt that the judgments rendered in the prior State court companion cases were valid and final. Third, the State court proceedings specifically addressed and adversely adjudicated Petitioner's claims of constitutional and civil rights violations in reaching their respective judgments. Finally, the parties were identical in both the companion State court proceedings and in this federal action.

Accordingly, the lower courts properly dismissed the federal complaint under the doctrine of collateral estoppel or issue preclusion, because the Petitioner was foreclosed as a matter of law from relitigating in federal court the same previously raised and adversely adjudicated claims. (Ra10 to 11).

CONCLUSION

For the reasons presented herein, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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WALTER G. LUGER
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Except Charles Kurebanas
and Socrates Kyritsis

APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED APRIL 23, 1992

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 91-5446

ROBERT J. BURCH,

Plaintiff,

v.

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; and SOCRATES KYRITSIS,

Defendants.

OPINION

APPEARANCES:

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Appendix A

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BISSELL, *District Judge*

This matter arises on the basis of defendants' motions for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Defendants Socrates Kyritsis, Charles Kurebanas, and the former Chatham Township officials have each moved for dismissal. As the legal theories underlying the three motions are identical, this Court will consider them together.

Appendix A

Plaintiff *pro se*, Robert J. Burch, is a resident of Chatham Township. Burch filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986,[1] on December 18, 1991, alleging violations of his constitutional rights. In a prolix, eighteen-count complaint, plaintiff essentially avers that defendants conspired to deprive him of his constitutional property rights, through the discriminatory application of a municipal zoning requirement.

Named as defendants in the complaint are the Township of Chatham ("Township"); the Planning Board of Chatham Township (the "Board"); Jeffrey Taylor, former Mayor of Chatham Township; Robert Kirkpatrick, former Township Engineer; Marshall Bissell, member of the Planning Board; Richard Bradley, member and Chairman of the Planning Board; Donald Malehorn, attorney for the Planning Board; Otto Vopelius, Secretary of the Planning Board; Priscilla Beck, member of the Planning Board;

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1. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 provides a federal cause of action for persons deprived of rights or privileges under the law as the result of a conspiracy.

Section 1986 provides a federal cause of action against persons having knowledge of and ability to prevent a conspiracy who fail to do so.

Gayle Williams, member of the Planning Board; Socrates Kyritsis, the property owner seeking to develop a lot adjoining plaintiff's property in Chatham Township; and Charles Kurebanas, a former attorney for Mr. Kyritsis.

Ascertaining plaintiff's version of the facts requires arduous distillation of plaintiff's complaint. Prior to filing this action, the plaintiff filed two cases in the New Jersey Superior Court, Law Division, against the same defendants named here. Both cases were decided against plaintiff. In separate appeals, the Appellate Division affirmed the trial court's rulings. Subsequently, the New Jersey Supreme Court denied plaintiff's petitions for certification.

The first of these cases, Appellate Division Docket No. A-4122-89T2, was decided March 8, 1991. Plaintiff challenged the Chatham Township Planning Board's approval of defendant Kyritsis' subdivision application, which had been granted June 1, 1987. Kyritsis sought approval of a plan to construct a residential development (Sycamore Hill) on property adjoining plaintiff's lot.

On June 15, 1987, plaintiff brought suit, setting forth four counts. The first three involved the Board's failure to comply with municipal zoning ordinances. These claims were remanded to the Board for a hearing *de novo,* due to significant deficiencies in the record of the proceedings before the Board, and were eventually dismissed as moot. Plaintiff's fourth claim alleged a violation of the plaintiff's constitutional rights under 42 U.S.C.A. §§ 1983, 1985 and 1986.

The trial court dismissed the federal law claim on summary judgment. The Appellate Division affirmed, finding no discernable violation of plaintiff's civil rights.

In the action currently pending before this Court, plaintiff

asserts that the Superior Court rendered opinions without providing an adequate hearing for plaintiff's claims. In the brief opposing defendants' motion to dismiss, plaintiff attempts to clarify this position, advancing the theory that the Superior Court's summary dismissal of the constitutional violations claim was "based primarily upon defendants' assertion of an 'irredeemably deficient' record before the planning board." Plaintiff argues that due to the state courts' view that the record before the Board was deficient, those courts failed to render a decision on the merits of plaintiff's constitutional claims.

In the second lawsuit filed by the plaintiff, Appellate Division Docket No. A-2323-89T2, plaintiff challenged local Ordinance 2-88, which amended the existing zoning law, as unconstitutional spot zoning. The Ordinance rendered the existing town corner lot setback requirements inapplicable to any lot that became a corner lot as the result of the dedication of a new street right of way. Plaintiff owned a lot adjacent to a proposed right of way. Without the amendment of Ordinance 2-88 to the municipal zoning law, plaintiff's lot would have been rendered a non-conforming corner lot. Plaintiff alleged that this Ordinance arbitrarily deprived him of a property interest in the previously prevailing setback requirement.

The trial court conducted a plenary hearing on October 31, November 2 and November 8, 1989, and entered final judgment against plaintiff on November 24, 1989. The Appellate Division affirmed, nothing that "[t]here is no constitutionally protected property interest in the application of a zoning ordinance's setback requirement." Plaintiff appealed both Appellate Division decisions to the New Jersey Supreme Court, which denied plaintiff's petitions for certification on July 9, 1991.

Plaintiff continues to advance the theory that by amending the

municipal zoning ordinance, defendants' violated his constitutionally protected property interest and denied him equal protection of the laws. Additionally, plaintiff maintains that his claims of civil rights violations were not adjudicated on the merits in the state court proceedings. For convenient reference, the texts of both Appellate Division opinions are annexed hereto as Exhibits A and B.

DISCUSSION

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Florida*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985).

A complaint drafted by a *pro se* litigant must be liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520 (1971), and *pro se* submissions "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh'g denied*, 429 U.S. 1066 (1977) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1971), *reh'g denied*, 405 U.S. 948 (1972)): *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *on reh'g*, *Gillespie v. Crawford*, 833 F.2d 47, 49 (5th Cir. 1987), *on reh'g*, 853 F.2d 1101 (5th Cir. 1988) (*en banc*).

When reviewing a *pro se* complaint, a court must assume plaintiff's factual allegations to be true and construe his claim

liberally. *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989); *Roman v. Jeffes*, 904 F.2d 192, 197 (3d Cir. 1990). In deciding whether to dismiss a *pro se* complaint it must "appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Therefore, on a motion to dismiss a complaint drafted by a *pro se* litigant, the complaint must be given even more leeway than the very liberal standards for withstanding a motion to dismiss a complaint drafted by an attorney.

While thus obliged to construe a litigant's *pro se* complaint liberally, a court may not bend the law in his favor. The Full Faith and Credit Act, 28 U.S.C. § 1738, mandates that state court proceedings " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons*, 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). This standard has been applied in civil rights actions filed under 42 U.S.C. § 1983. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3d Cir. 1989) (citing *Miara v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 74 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980)). Additionally, under this statute, federal courts are to "refer to the preclusion law of the State in which judgment was rendered," *Marress*, 470 U.S. at 380, and are not to "employ their own rules of res judicata in determining the effect of state judgments." (*Id.*, quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982)). Utilizing these principles, New Jersey law must be examined in resolving the preclusion controversy presented here, that is, whether plaintiff's claims are precluded because of the foregoing judgments in state court.

The New Jersey Supreme Court has often employed the doctrine of *res judicata*, which generally provides that "[a] cause

of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigated by those parties . . . in a new proceeding." *Roberts v. Goldner*, 79 N.J. 82, 85 (1979) (citations omitted). The Court has refined and elucidated the elements of this doctrine, particularly in the recent decision *Watkins v. Resorts Intern. Hotel & Casino*, 124 N.J. 398 (1991). In *Watkins*, the Court noted that federal law and New Jersey law both require three basic elements:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

(*Id.* at 412 (citing *Federated Stores v. Moitie*, 452 U.S. 394, 398 (1981).

The *Watkins* Court also explained that *res judicata* or claim preclusion applies to all relevant matters that *could* have been determined in a prior action, not merely those matters actually decided. (*Id.*, citing *Angel v. Bullington*, 330 U.S. 183, 192-93 (1947); *Culver v. Insurance Co. of North America*, 115 N.J. 451 (1989)). A litigant seeking redress for a single wrong must present all legal theories in the initial action, or they will be precluded in any subsequent action. (*Id.* at 413) (citations omitted).

Applying the first prong of the *Watkins* multi-factored test to the case at bar, it is clear that the judgments entered in the New Jersey state courts were valid, final and on the merits. Plaintiff's civil rights claims were dismissed on summary judgment by the trial court, and this ruling was specifically addressed and affirmed

by the Appellate Division. This judgment meets the *Watkins* test, as "[a] judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.' " *Velasquez v. Franz*, 123 N.J. 498, 507 (1991) (citations omitted).

The second prong of this test is also met, as the parties in the instant case are identical to the parties in the antecedent state action.

The final prong under the *Watkins* claim preclusion analysis concerns whether the claim in the subsequent action emanates from the same incident that prompted the initial claim. Application of this prong is not simple, and requires a four-point analysis in which the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions) *Gissen v. Tackman*, 401 F. Supp. 310, 312 (D.N.J. 1975); (2) whether the theory of recovery is the same; (3) whether the witnesses and the documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first) *O'Shea v. Chrysler Corporation*, 206 F. Supp. 601, 605 (D.N.J. 1962); and (4) whether the *material* facts alleged are the same. *United States v. Athlone Industries Inc.*, 746 F. Supp. 977, 984 (3d Cir. 1984).

Culver v. Insurance Co. of North America, 115 N.J. 451, 461-62 (12989) (emphasis in original).

Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the state action. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim. Accordingly, this claim is barred under the doctrine of *res judicata.*

Plaintiff's claim is also barred under the doctrine of issue preclusion or collateral estoppel. " 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.' " *Wheeler v. Nieves,* 762 F. Supp. 617, 624 (D.N.J. 1991) (citations omitted). A plaintiff will not be permitted to relitigate issues that have been directly addressed in prior proceedings. (*Id.* at 615).

Issue preclusion is warranted if a court concludes that

> (l) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Electric & Gas Co.,* 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board*

of Adjustment, 202 N.J. Super. 312 (App. Div. 1985)).

These criteria are all satisfied in the case at bar. The state court addressed plaintiff's assertions of civil rights allegations, and found them to be meritless. The court did not, as plaintiff maintains, fail to adjudicate these allegations due to a deficient record before the planning board. Rather, the court granted summary judgment, and declared that plaintiff failed to present evidence sufficient to support a finding that the alleged civil rights violations actually occurred.

Furthermore, it is evident that the state court's judgments were final and valid. The civil rights claims were addressed at both the trial and appellate levels, and found to be meritless. These claims were essential to the plaintiff's state action, and the parties in this action are the same as those in the state action. Consequently, plaintiff's claim is barred under the doctrine of collateral estoppel.

It is indisputable from the facts set forth in plaintiff's complaint, and from the record in the state proceedings, that the claims advanced by the plaintiff have already been adjudicated in state court. Specifically, plaintiff's allegations of civil rights violations were directly addressed by both the trial court and the appellate court, and found to be without merit. As a result, plaintiff's claims are barred from consideration in this court under the parallel doctrines of *res judicata* and collateral estoppel.[2]

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2. Plaintiff asserts that jurisdiction in this court, as to all counts, is based upon 42 U.S.C. § 1983. (Compl., ¶ 1 and *passim*). Some counts as phrased appear to plead claims cognizable (it [sic] at all) only under state law. Because they either were or could have been raised in the prior Superior Court suits, plaintiff is barred from raising them belatedly in the present action. Alternatively, such state claims are subject to dismissal for lack of pendent jurisdiction due to the dismissal of all federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Appendix A

Defendants' motion to dismiss is accompanied by a request to enjoin plaintiff from further pursing this litigation, and to impose sanctions to penalize plaintiff for "needlessly wasting judicial resources and the taxpayer's money." Therefore, this Court must analyze plaintiff's complaint to determine whether Rule 11 sanctions are warranted.[3]

"Rule 11 sanctions may be imposed 'in the exceptional circumstance' where the claim or motion is patently unmeritorious or frivolous." *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (citing *Giardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); *see also Dura Systems. Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 556 (3d Cir. 198); *Mary Ann Pensiero Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988)). The requirement that an attorney engage in a reasonable inquiry as to both the facts and the law was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." (Fed. R. Civ. P. 11 (advisory committee notes); *see also Dura Systems*, 886 F.2d at 556).

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3. Fed. R. Civ. P. 11 provides, in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

Appendix A

Rule 11 sanctions are proper only in situations involving a signed pleading or other paper. *Schering Corp. v. Vitarine Pharmaceutical. Inc.*, 889 F.2d 490, 496 (3d Cir. 1989) (citations omitted). In addition, the proper focus is on the circumstances that existed at the time counsel filed the challenged paper. (*Id.*) "The wisdom of hindsight is to be avoided; the attorney's conduct must be judged by what was reasonable to believe at the time the pleading, motion, or other paper was submitted." (*Id.*)

The Third Circuit has also cautioned that "[l]itigants misuse the Rule when sanctions are brought against a party whose only sin was being on the unsuccessful side of a ruling or judgment." *Giardo*, 835 F.2d at 483; *see also Dura Systems*, 886 F.2d at 556; *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986) (district court may not impose sanctions simply because party's nonfrivolous argument is found by the district court to be unjustified). Furthermore, the fact that an argument is self-serving does not make it rise to the level of becoming "patently unmeritorious or frivolous." *See Dura Systems*, 886 F.2d at 557.

The United States Supreme Court recently considered the scope of a court's jurisdiction to impose sanctions even after a plaintiff voluntarily dismisses a complaint. The Court stated that

> the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. See Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 [USCS Court Rules, Fed. Rules of Civ. Proc., Notes following Rule 11]. Rule 11

> imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and "not interposed for any improper purpose."

Cooter & Geil v. Hartmarx Corp., __ U.S. __, 110 L. Ed. 2d 359, 375 (1990).

Applying these principles to the case at bar, it does not currently appear that the imposition of sanctions or the issuance of an injunction against further litigation are warranted. Although sanctions may be imposed on *pro se* litigants, *see Calesnick v. Redevelopment Auth. of Philadelphia*, 696 F. Supp. 1053, 1056 (E.D. Pa. 1988), plaintiff Robert Burch has not yet demonstrated the obstinacy in pursuing his failed claim that the *Calesnick* plaintiff displayed. Burch's complaint and responsive pleadings indicate that his actual belief, though erroneous, was that the state court never properly addressed his civil rights claim. Thus, although the complaint is clearly barred under the doctrines of *res judicata* and collateral estoppel, it is not so patently unmeritorious as to justify the imposition of sanctions.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 23 , 1992

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-4122-89T2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4122-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS,

Defendants-Respondents.

Argued February 20, 1991 — Decided March 8, 1991

Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

Robert J. Burch argued *pro se*.

Appendix B

Daniel S. Bernstein argued the cause for respondents Planning Board of Chatham Township; Township of Chatham; Jeffrey Taylor; Robert Kirkpatrick; Marshall Bissell; Richard Bradley; Priscilla Beck; Otto Vopelius; Gayle Williams and Donald Malehorn (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

John C. Kennedy argued the cause for respondent Kurebanas (O'Donnell, Kennedy, Vesple & Piechta, attorneys; Mr. Kennedy, of counsel and on the brief).

Edward F. Broderick, Jr., argued the cause for respondent Kyritsis (Broderick, Newmark & Grather, attorneys; Mr. Broderick and Louis Mondello, on the brief).

PER CURIAM

This appeal is companion to that considered under Docket No. A-2323-89T2. The statement of background factual material set forth in our decision on that appeal filed contemporaneously herewith is incorporated herein and made a part hereof by reference.

In January 1986, defendant Socrates Kyritsis applied for subdivision approval of Lot 42, a 9.41 acre parcel located on Block 38 on the municipal tax map. The parcel is located between Meyersville Road and Fairmount Avenue, behind plaintiff's property, Lot 41, in Chatham Township. The purpose of his

application was to construct a residential development to be known as "Sycamore Hill." The Chatham Township Planning Board held public meetings on the application on May 5, 19, September 15, October 20, November 17 and December 15, 1986, March 2, June 1 and 15, 1987. On June 1, 1987, the Board granted preliminary major subdivision approval, memorialized by written resolution dated June 15, 1987.

On June 15, 1987, plaintiff brought this suit in lieu of prerogative writ. His amended complaint, filed October 22, 1987, was framed in four counts. The first three counts challenged the Board's preliminary approval for failure to conform with municipal ordinances. The fourth count sought monetary damages from all defendants on the claim that they had violated plaintiff's constitutional rights, contrary to 42 *U.S.C.A.* §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, and each individual member of the Planning Board who voted in favor of the subdivision.

Recognizing that significant deficiencies existed in the record of the proceedings before the Planning Board, the matter was remanded at defendants' request to the board for a hearing *de novo* and the first three counts of the amended complaint were dismissed as moot. The fourth count was dismissed on summary judgment for failure of plaintiff to demonstrate any genuine issue of material fact to support his claim that his constitutional rights had been violated. Plaintiff now appeals from that determination.

The basis of plaintiff's civil rights action lies in the fact that the subdivision approval was granted over plaintiff's objections. Plaintiff asserts that the approval came about as the result of a

conspiracy among the defendants whereby Kyritsis would pay the Township $125,000. The facts underlying the alleged conspiracy can be briefly stated. The original subdivision plans envisioned the installation of detention basins to accommodate drainage flow from the steep slopes at the far end of the tract along Fairmount Avenue where Sycamore Hill would have approximately 400 feet of frontage. The anticipated cost of the basins was approximately $125,000. After the plans had been submitted and reviewed it was discovered that the Township was considering the reconstruction of Fairmount Avenue and the installation of drainage improvements for the benefit of the entire area. As we understand it from the record, the Township determined to substitute a larger diameter pipe with increased flow rates so that it would accommodate not only the area as it then existed, but with the new development in place as well. The anticipated cost of the substitution to the township was to be approximately $10,000. However, since Kyritsis would then be able to tie into the municipal system, thereby saving approximately $125,000, he agreed to pay that sum to the municipality. We find nothing in the record to support a different version of that transaction.

We discern no infringement of plaintiff's civil rights or any damage to plaintiff resulting from defendants' conduct. His property has not been diminished in value and the fact that the changed landscape will be less to his liking is not a redressible injury.

We note in particular that under our decision in *Anastasio v. Planning Bd. of Tp. of West Orange*, 209 *N.J. Super.* 499 (App. Div.), *certif. denied*, 107 *N.J.* 46 (1986), defendants who are being sued in their individual capacities as members of the Planning Board are absolutely immune from liability in actions brought under 42 *U.S.C.A.* § 1983.

Appendix B

It has long been recognized that the summary judgment procedure

> is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

Judson v. Peoples Bank & Trust Co. of Westfield, 17 *N.J.* 67, 74 (1954). As the Supreme Court noted in *Robbins v. Jersey City*, 23 *N.J.* 229, 241 (1957), the summary judgment procedure affords protection "against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention."

The summary judgment dated February 26, 1988, is affirmed substantially for the reasons stated by Judge Stanton for the Law Division in his oral opinion of the same date.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-2323-89T2

NOT FOR PUBLICATION WITHOUT THE
APROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2323-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE TOWNSHIP OF CHATHAM

Defendant-Respondent.

Argued February 20, 1991 - Decided Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

John Anthony Lombardi argued the case for appellant (Robert J. Burch, *pro se*, on the brief).

Daniel S. Bernstein argued the cause for respondent (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

Appendix C

PER CURIAM

This appeal is companion to that considered under Docket No. A-4122-89T2.

Plaintiff is the owner of Lot 41 on Block 38 in the Township of Chatham. The lot has a frontage on Meyersville Road of 108 feet and a depth of 300 feet. To the south, immediately behind plaintiff's lot, is Lot 42, the subject of a development application by Socrates Kyritsis. A 57.7-foot wide extension (the "staff") of Lot 42 runs out from behind plaintiff's lot along its easterly side for approximately 270 feet to Meyersville Road. As part of the development project, Kyritsis proposed to install within the staff a 50-foot wide roadway to be known as Sycamore Drive, which would provide access to the interior development from Meyersville Road. The effect of this would be to transform plaintiff's lot into a corner lot. The Chatham ordinance requires that structures on corner lots conform with front yard setback requirements with respect to both abutting streets so that corner lot structures will be in line with all other structures on both streets. Although plaintiff's house now meets township sideyard requirements for non-corner lots, the installation of Sycamore Drive would convert it into a nonconforming structure. Its actual setback on the new street would be only around 34.89 feet and would fail to satisfy the 50-foot front yard/side yard setback requirements for corner lots.

Efforts were made by Kyritsis to meet plaintiff's objections to the change of his lot into a nonconforming use. Since only 50 feet of the 57.7-foot wide staff were required for the Sycamore Drive right-of-way, one solution proposed was to convey the excess 7.7 feet to plaintiff, thereby increasing his setback on Sycamore Drive to 42.59 feet. Another possible solution was to subdivide the 7.7-

foot wide strip into a separate lot which would lie between plaintiff's lot and Sycamore Drive. Although such a lot would be unusable, it would avoid making plaintiff's lot into a corner lot subject to 50-foot setback requirements on both abutting streets.

Neither proposal was acceptable and the situation was ultimately resolved by the Township through the enactment of Ordinance 2-88. The import thereof is that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land. This exception to the setback requirements is contingent upon the dedication occurring after the erection of a principal structure on the lot. The effect of this, obviously, is to save plaintiff's lot from nonconformity.

Plaintiff brought this action in lieu of prerogative writ to invalidate Ordinance 2-88. He challenges the ordinance as being "arbitrary, unreasonable and capricious, and as discriminatory spot zoning which takes private property without due process. . . ." Plaintiff insists that his right to the requirement of a side yard setback from Sycamore Drive of the same distance as all other corner lots in the community is inviolate, and that Kyritsis be required to install Sycamore Drive so as not to infringe upon plaintiff's claimed property interest in the prevailing setback requirement.

After a plenary hearing conducted on October 31, November 2 and November 8, 1989, a final judgment was entered November 24, 1989, in favor of defendant and against plaintiff. Plaintiff appeals.

We find no merit to the premise of plaintiff's suit. There is no

constitutionally protected property interest in the application of a zoning ordinance's setback requirement. In our view, the Township's determination to render corner lot setback requirements inapplicable to lots anywhere in the municipality which become corner lots under the circumstances here presented is a legitimate exercise of legislative power not subject to judicial superintendence.

We affirm substantially for the reasons stated by Judge Stanton in his oral opinion for the Law Division dated November 9, 1989.